

TITLE FOUR. Criminal Cases

DIVISION I. Pretrial

CHAPTER 1. Pretrial Proceedings

Title Four, Criminal Cases—Division I, Pretrial—Chapter 1, Pretrial Proceedings—adopted by the Judicial Council effective January 1, 2001.

Rule 4.100. Arraignments

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Rule 4.100. Arraignments

At the arraignment on the information or indictment, unless otherwise ordered for good cause, and on a plea of not guilty, including a plea of not guilty by reason of insanity,

- (1) the court shall set dates for
 - (A) trial, giving priority to a case entitled to it under law,
 - (B) a readiness conference within 1 to 14 days before trial, and
 - (C) filing and service of motions and responses and hearing thereon;
- (2) a plea of not guilty shall be entered if a defendant represented by counsel fails to plead or demur; and
- (3) an attorney may not appear specially.

Rule 4.100 renumbered and amended effective January 1, 2001; adopted as rule 227.4 effective January 1, 1985; previously amended effective June 6, 1990.

Advisory Committee Comment

2000—Cross reference: Penal Code section 987.1

Drafter's Notes

1984—See note following rule 227.1.

1985—Section 10 of the Standards of Judicial Administration has been repealed and replaced by sections 10 and 10.1, and CRC Rules 227.1-227.10. The changes include: 1. Providing for the designation of a criminal division in courts having two or more criminal departments. 2. Identifying the duties of a supervising judge of the criminal division. 3. Specifying time limits for criminal proceedings. 4. Requiring the setting of dates for trial, readiness conferences, and pretrial motion hearings at the time of arraignment. 5. Providing that a readiness conference must be held within one to fourteen days before trial. 6. Disfavoring continuances. 7. Requiring regular meetings between judges and interested persons and organizations about the criminal court system. 8. Establishing procedures for certification to the superior court pursuant to Penal Code section 859a. 9. Directing the adoption of procedures to facilitate dispositions before the preliminary hearings. 10. Recommending by means of new standards the use in all courts of the criminal master calendar system and the disposition of pretrial motions before or at the readiness conference.

1990—Rule 227.4(2), concerning arraignments, is amended to delete the reference to the postindictment preliminary hearing.

2001—Rules 227.3–227.7, 227.9, 228.1, 228.2, 241.2, 260, 401–490, 516.1, 516.2, 527.9, 529.2, 530, 535, 801, 840–844, 850, 895, and sections 4, 4.1, 4.2, 8.7, 10, 12 and 13 of the Standards of Judicial Administration (Revision and reorganization of rules and standards for criminal cases). The rules and standards applicable to criminal cases are rewritten, clarified, and reordered under a separate title (Title Four) in light of trial court unification.

Rule 4.101. Bail in criminal cases

The fact that a defendant in a criminal case has or has not asked for a jury trial shall not be taken into consideration in fixing the amount of bail, nor shall bail once set be increased or reduced by reason of such fact.

Rule 4.101 renumbered effective January 1, 2001; adopted as rule 801 effective July 1, 1964.

Rule 4.102. Uniform bail and penalty schedules—traffic, boating, fish and game, forestry, public utilities, parks and recreation, business licensing

The Judicial Council of California has established the policy of promulgating uniform bail and penalty schedules for certain offenses in order to achieve a standard of uniformity in the handling of these offenses.

In general, bail is used to ensure the presence of the defendant before the court. Pursuant to Vehicle Code sections 40512 and 13103, bail may also be forfeited and such forfeiture may be had without the necessity of any further court proceedings and treated as a conviction for specified Vehicle Code offenses. A penalty in the form of a monetary sum is a fine imposed as all or a portion of a sentence imposed.

To achieve substantial uniformity of bail and penalties throughout the state in traffic, boating, fish and game, forestry, public utilities, parks and recreation, and business licensing cases, the trial court judges, in performing their duty under section 1269b of the Penal Code to meet annually to revise and adopt, before the first day of January, a schedule of bail and penalties for all misdemeanor and infraction offenses except Vehicle Code infractions, shall give consideration to the Uniform Bail and Penalty Schedules approved by the Judicial Council. The Uniform Bail and Penalty Schedule for infraction violations of the Vehicle Code shall be established by the Judicial Council in accordance with section 40310 of the Vehicle Code. Judges shall give consideration to requiring additional bail for aggravating or enhancing factors.

The judge who calls the annual meeting pursuant to section 1269b of the Penal Code shall, as soon as practicable after the meeting, mail a copy of the schedule to the Judicial Council with a report stating how the revised schedule differs from the council's uniform traffic bail and penalty schedule, uniform boating bail and penalty schedule, uniform fish and game bail and penalty schedule, uniform forestry bail and penalty schedule, uniform public utilities bail and penalty schedule, uniform parks and recreation bail and penalty schedule, or uniform business licensing bail and penalty schedule.

The purpose of this uniform bail and penalty schedule is to

- (1) show the standard amount for bail, which for Vehicle Code offenses may also be the amount utilized for a bail forfeiture in lieu of further proceedings; and
- (2) serve as a guideline for the imposition of a fine as all or a portion of the penalty for a first conviction of a listed offense where a fine is used as all or a portion of the penalty for such offense. The

amounts shown for the misdemeanors on the boating, fish and game, forestry, public utilities, parks and recreation and business licensing bail and penalty schedules have been set with this dual purpose in mind.

Unless otherwise shown, the maximum penalties for the listed offenses are six months in the county jail or a fine of \$1,000, or both. The penalty amounts are intended to be used to provide standard fine amounts for a first offense conviction of a violation shown where a fine is used as all or a portion of the sentence imposed.

Note [footnote supplied from Administrative Office of the Courts Rules Memorandum No. R-2(00)]:

Courts may obtain copies of the Uniform Bail and Penalty Schedules by contacting:

Court Operations Services
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, CA 94102-3660
(415) 865-7611
Fax (415) 865-4330
<http://www.courtinfo.ca.gov/reference>

Rule 4.102 renumbered and amended effective January 1, 2001; adopted as rule 850 effective January 1, 1965; previously amended effective January 1, 1970, January 1, 1971, July 1, 1972, January 1, 1973, January 1, 1974, July 1, 1975, July 1, 1979, July 1, 1980, July 1, 1981, January 1, 1983, July 1, 1984, July 1, 1986, January 1, 1989, January 1, 1990, January 1, 1993, January 1, 1995, and January 1, 1997.

Drafter's Notes

1984—Rule 850 has been amended to remove the Judicial Council's recommended bail schedules from the published rules. The bail schedules will be sent to municipal and justice courts and provided to others on request. The Uniform Traffic Bail Schedule and the Uniform Fish and Game Bail Schedule were amended and a new Uniform Forestry Bail Schedule was adopted by the council.

1988—The council amended rule 850 to encourage municipal and justice courts in the annual revision of their bail schedules to require additional bail for aggravating or enhancing factors as required by Penal Code section 1269b. The council also revised the Uniform Traffic Bail Schedule as required by legislation (Stats. 1988, ch. 988).

1995—On the recommendation of the Traffic Ad Hoc Advisory Committee, the council: (1) adopted technical revisions to rule 850 (Uniform Bail and Penalty Schedules); . . .

1997—Rule 850, *Uniform Bail and Penalty Schedules*, has been revised to conform to recent legislation and to clarify the amount of fees collectible for correctable violations when proof of correction has been received.

1998—The schedules, authorized under rule 850, were amended to bring them into conformance with new legislation. In addition, language was added to the preface of the schedule indicating that, except as otherwise required by statute, courts have discretion to suspend the minimum fine under Penal Code § 1203b. The mandatory appearance for speeding infractions of 26 miles per hour or more above the speed limit was deleted.

2001—See note following rule 4.100.

Rule 4.110. Time limits for criminal proceedings on information or indictment

Time limits for criminal proceedings on information or indictment are as follows:

- (1) the information shall be filed within 15 days after a person has been held to answer for a public offense;
- (2) the arraignment of a defendant shall be held on the date the information is filed or as soon thereafter as the court directs;
- (3) a plea or notice of intent to demur on behalf of a party represented by counsel at the arraignment shall be entered or made no later than seven days after the initial arraignment, unless the court lengthens time for good cause.

Rule 4.110 renumbered and amended effective January 1, 2001; adopted as rule 227.3 effective January 1, 1985; previously amended effective June 6, 1990.

Drafter's Notes

1984—See note following rule 227.1.

1990—Rule 227.3(a)(3) is amended concerning time limits for a plea or notice of intent to demur, to delete the reference to the post-indictment preliminary hearing, which is prohibited under new section 14.1 of article I of the California Constitution. Rule 227.3(a)(4), concerning trial setting, is repealed as inconsistent with new Penal Code section 1049.5, which requires that a trial date be set within 60 days of the defendant's superior court arraignment. Rule 227.3(b), concerning waiver of time limits, is repealed as consistent with the repeal of rule 227.3(a)(4).

2001—See note following rule 4.100.

Rule 4.111. Pretrial motions in criminal cases

- (a) **[Time for filing papers and proof of service]** Unless otherwise ordered or specifically provided by law, all pretrial motions, accompanied by points and authorities, shall be served and filed at least 10 calendar days, all papers opposing the motion at least five calendar days, and all reply papers at least two court days before the time appointed for hearing. Proof of service of the moving papers shall be filed no later than five calendar days before the time appointed for hearing.
- (b) **[Failure to serve and file timely points and authorities]** The court may consider the failure without good cause of the moving party to serve and file points and authorities within the time permitted as an admission that the motion is without merit.

Rule 4.111 renumbered effective January 1, 2001; adopted as rule 227.5 effective January 1, 1985.

Drafter's Notes

1984—See note following rule 227.1

2001—See note following rule 4.100.

Rule 4.112. Readiness conference

- (a) **[Date and appearances]** A readiness conference shall be held within 1 to 14 days before the date set for trial. Trial counsel shall appear and be prepared to discuss the case and determine whether the case can be disposed of without trial. The prosecuting attorney shall have authority to dispose of the case, and the defendant shall be present in court.

(Subd (a) renumbered and amended effective January 1, 2001; adopted as untitled subdivision, effective January 1, 1985.)

- (b) **[Motions]** Except for good cause, the court should hear and decide any pretrial motion in a criminal case before or at the readiness conference.

(Subd (b) adopted effective January 1, 2001.)

Rule 4.112 renumbered and amended effective January 1, 2001; subd. (a) adopted as rule 227.6 effective January 1, 1985, subd (b) adopted as Standards of Judicial Administration section 10.1 effective January 1, 1985.

Drafter's Notes

1984—(Subd (a)): See note following rule 227.1.

1984—(Subd (b)): See note following section 10 of the Standards of Judicial Administration.

2001—See note following rule 4.100.

Rule 4.113. Motions and grounds for continuance of criminal case set for trial

Motions to continue the trial of a criminal case are disfavored and shall be denied unless the moving party, pursuant to Penal Code section 1050, presents affirmative proof in open court that the ends of justice require a continuance.

Rule 4.113 renumbered effective January 1, 2001; adopted as rule 227.7 effective January 1, 1985.

Drafter's Notes

1984—See note following rule 227.1.

2001—See note following rule 4.100.

Rule 4.114. Certification pursuant to Penal Code section 859a

When a plea of guilty or no contest is entered pursuant to Penal Code section 859a, the magistrate shall (1) set a date for imposing sentence and (2) refer the case to the probation officer for action as provided in Penal Code sections 1191 and 1203.

Rule 4.114 renumbered and amended effective January 1, 2001; adopted as rule 227.9 effective January 1, 1985.

Drafter's Notes

1984—See note following rule 227.1.

2001—See note following rule 4.100.

Rule 4.115. Criminal case assignment

To ensure that the court's policy on continuances is firm and uniformly applied, that pretrial proceedings and trial assignments are handled consistently, and that cases are tried on a date certain, each court not operating on a direct calendaring system, shall assign all criminal matters to one or more master calendar departments. The presiding judge of a master calendar department shall conduct or supervise the conduct of all

arraignments and pretrial hearings and conferences, and assign to a trial department any case requiring a trial or dispositional hearing.

Rule 4.115 renumbered and amended effective January 1, 2001; adopted as Sec. 10 effective January 1, 1985.

Drafter's Notes

1984—Section 10 has been repealed and replaced by rules 227.1-227.10, and sections 10 and 10.1 of the Standards of Judicial Administration. The changes include:

1. Providing for the designation of a criminal division in courts having two or more criminal departments.
2. Identifying the duties of a supervising judge of the criminal division.
3. Specifying time limits for criminal proceedings.
4. Requiring the setting of dates for trial, readiness conferences, and pretrial motion hearings at the time of arraignment.
5. Providing that a readiness conference must be held within one to fourteen days before trial.
6. Disfavoring continuances.
7. Requiring regular meetings between judges and interested persons and organizations about the criminal court system.
8. Establishing procedures for certification to the superior court pursuant to Penal Code section 859a.
9. Directing the adoption of procedures to facilitate dispositions before the preliminary hearing.
10. Recommending by means of new standards the use in all courts of the criminal master calendar system and the disposition of pretrial motions before or at the readiness conference.

2001—See note following rule 4.100.

Rule 4.116. Certification to juvenile court

- (a) **[Application]** This rule applies to all cases not filed in juvenile court in which the person charged by an accusatory pleading appears to be under the age of 18, except (1) where the child has been found not a fit and proper subject to be dealt with under the juvenile court law or (2) where

the prosecution was initiated as a criminal case under Welfare and Institutions Code section 602(b) or 707(d).

(Subd (a) adopted effective January 1, 2001.)

(b) [Procedure to determine whether certification is appropriate] If an accusatory pleading is pending, and it is suggested or it appears to the court that the person charged was under the age of 18 on the date the offense is alleged to have been committed, the court shall immediately suspend proceedings and conduct a hearing to determine the true age of the person charged. The burden of proof of establishing the age of the accused person shall be on the moving party. If, after examination, the court is satisfied by a preponderance of the evidence that the person was under the age of 18 on the date the alleged offense was committed, the court shall immediately certify the matter to the juvenile court and state on the certification order:

- (1) The crime with which the person named is charged;
- (2) That the person was under the age of 18 on the date of the alleged offense;
- (3) The date of birth of the person;
- (4) The date of suspension of criminal proceedings; and
- (5) The date and time of certification to juvenile court.

(Subd (b) renumbered and amended effective January 1, 2001; adopted as untitled subdivision effective January 1, 1991.)

(c) [Procedure upon certification] If the court determines that certification to the juvenile court is appropriate under subdivision (b) of this rule, copies of the certification, the accusatory pleading, and any police reports shall immediately be transmitted to the clerk of the juvenile court. Upon receipt of the documents, the clerk of the juvenile court shall immediately notify the probation officer, who shall immediately investigate the matter to determine whether to commence proceedings in juvenile court.

(Subd (c) renumbered and amended effective January 1, 2001; adopted as untitled subdivision effective January 1, 1991.)

- (d) **[Procedure if child is in custody]** If the person is under the age of 18 and is in custody, the person shall immediately be transported to the juvenile detention facility.

(Subd (d) renumbered and amended effective January 1, 2001; adopted as untitled subdivision effective January 1, 1991.)

Rule 4.116 renumbered and amended effective January 1, 2001; adopted as rule 241.2 effective January 1, 1991; previously amended July 1, 1991.

Drafter's Notes

1991—The council amended rules 241.2 and 529.2 on certification to juvenile court to clarify that the preponderance of the evidence standard applies.

2001—See note following rule 4.100.

Rule 4.117. Qualifications for appointed trial counsel in capital cases

- (a) **[Purpose]** This rule defines minimum qualifications for attorneys appointed to represent persons charged with capital offenses in the superior courts. These minimum qualifications are designed to promote adequate representation in death penalty cases and to avoid unnecessary delay and expense by assisting the trial court in appointing qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether the defendant received effective assistance of counsel.
- (b) **[General qualifications]** In cases in which the death penalty is sought, the court must assign qualified trial counsel to represent the defendant. The attorney may be appointed only if the court, after reviewing the attorney's background, experience, and training, determines that the attorney has demonstrated the skill, knowledge, and proficiency to diligently and competently represent the defendant. An attorney is not entitled to appointment simply because he or she meets the minimum qualifications.
- (c) **[Designation of counsel]**
- (1) If the court appoints more than one attorney, one must be designated lead counsel and meet the qualifications set forth in (d) or (f), and at least one other must be designated associate counsel and meet the qualifications set forth in (e) or (f).

- (2) If the court appoints only one attorney, that attorney must meet the qualifications set forth in (d) or (f).

(d) [Qualifications of lead counsel] To be eligible to serve as lead counsel, an attorney must:

- (1) Be an active member of the State Bar of California;
- (2) Be an active trial practitioner with at least 10 years' litigation experience in the field of criminal law;
- (3) Have prior experience as lead counsel in either
 - (A) At least 10 serious or violent felony jury trials, including at least 2 murder cases, tried to argument, verdict, or final judgment; or
 - (B) At least 5 serious or violent felony jury trials, including at least 3 murder cases, tried to argument, verdict, or final judgment;
- (4) Be familiar with the practices and procedures of the California criminal courts;
- (5) Be familiar with and experienced in the use of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence;
- (6) Have completed within two years prior to appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and
- (7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

(e) [Qualifications of associate counsel] To be eligible to serve as associate counsel, an attorney must:

- (1) Be an active member of the State Bar of California;
- (2) Be an active trial practitioner with at least three years' litigation experience in the field of criminal law;

- (3) Have prior experience as
 - (A) Lead counsel in at least 10 felony jury trials tried to verdict, including 3 serious or violent felony jury trials tried to argument, verdict, or final judgment; or
 - (B) Lead or associate counsel in at least 5 serious or violent felony jury trials, including at least 1 murder case, tried to argument, verdict, or final judgment;
 - (4) Be familiar with the practices and procedures of the California criminal courts;
 - (5) Be familiar with and experienced in the use of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence;
 - (6) Have completed within two years prior to appointment at least 15 hours of capital case defense training approved for minimum continuing legal education credit by the State Bar of California; and
 - (7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases.
- (f) **[Alternative qualifications]** The court may appoint an attorney even if he or she does not meet all of the qualifications set forth in (d) or (e) if the attorney demonstrates the ability to provide competent representation to the defendant. If the court appoints counsel under this subdivision, it must state on the record the basis for finding counsel qualified. In making this determination, the court must consider whether the attorney meets the following qualifications:
- (1) The attorney is an active member of the State Bar of California or admitted to practice *pro hac vice* pursuant to rule 983;
 - (2) The attorney has demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases;
 - (3) The attorney has had extensive criminal or civil trial experience;

- (4) Although not meeting the qualifications set forth in (d) or (e), the attorney has had experience in death penalty trials other than as lead or associate counsel;
 - (5) The attorney is familiar with the practices and procedures of the California criminal courts;
 - (6) The attorney is familiar with and experienced in the use of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence;
 - (7) The attorney has had specialized training in the defense of persons accused of capital crimes, such as experience in a death penalty resource center;
 - (8) The attorney has ongoing consultation support from experienced death penalty counsel;
 - (9) The attorney has completed within the past two years prior to appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and
 - (10) The attorney has been certified by the State Bar of California's Board of Legal Specialization as a criminal law specialist.
- (g) **[Public defender appointments]** When the court appoints the Public Defender under Penal Code section 987.2, the Public Defender should assign an attorney from that office or agency as lead counsel who meets the qualifications described in (d) or assign an attorney that he or she determines would qualify under (f). If associate counsel is designated, the Public Defender should assign an attorney from that office or agency who meets the qualifications described in (e) or assign an attorney he or she determines would qualify under (f).
- (h) **[Standby or advisory counsel]** When the court appoints standby or advisory counsel to assist a self-represented defendant, the attorney must qualify under (d) or (f) of this rule.

Rule 4.117 adopted effective January 1, 2003.

CHAPTER 2. Transfer and Change of Venue

Title Four, Criminal Cases—Division I, Pretrial—Chapter 2, Transfer and Change of Venue—adopted effective January 1, 2001.

Rule 4.150. Transfer of criminal actions or proceedings

Rule 4.151. Application and hearing

Rule 4.152. Selection of court

Rule 4.153. Order of transfer

Rule 4.154. Proceedings in court receiving case

Rule 4.160. Policies to be considered before ordering and transferring a criminal case on change of venue

Rule 4.161. Change of venue case to be tried by judge from county in which the case originated—criminal cases

Rule 4.162. Guidelines for reimbursement of costs in change of venue cases—criminal cases

Rule 4.150. Transfer of criminal actions or proceedings

Rules 4.150 to 4.154, inclusive, shall govern the transfer of criminal actions or proceedings.

Rule 4.150 renumbered and amended effective January 1, 2001; adopted as rule 840 effective March 4, 1972.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.151. Application and hearing

Application for the transfer of a criminal action or proceeding pursuant to section 1033 or 1034 of the Penal Code shall be by notice of motion supported by affidavit filed with the court setting forth the facts upon which the application is based. Except for good cause shown, the application shall be filed at least 10 days prior to the date set for trial, and a copy shall be served upon the adverse party at least 10 days prior to the hearing on the application. At the hearing counteraffidavits may be filed.

Rule 4.151 renumbered and amended effective January 1, 2001; adopted as rule 841 effective March 4, 1972.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.152. Selection of court

When the court in which the action is pending determines that it should be transferred pursuant to section 1033 or 1034 of the Penal Code, it shall advise the Administrative Director of the Courts of the pending transfer. Upon being advised the Director shall, in order to expedite judicial business and equalize the work of the judges, suggest a court or courts that would not be unduly burdened by the trial of the case. Thereafter, the court in which the case is pending shall transfer the case to a proper court as it determines to be in the interest of justice.

Rule 4.152 renumbered and amended effective January 1, 2001; adopted as rule 842 effective March 4, 1972.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.153. Order of transfer

The order of transfer shall be entered upon the minutes or the docket and the clerk shall immediately make out and transmit to the court to which the action is transferred a certified copy of the order of transfer record, pleadings and proceedings in the action including the undertakings for the appearance of the defendant and of the witnesses.

Rule 4.153 renumbered and amended effective January 1, 2001; adopted as rule 843 effective March 4, 1972.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.154. Proceedings in court receiving case

The court to which the action is transferred shall proceed as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action is transferred shall at any time, upon application of the district attorney or the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained.

Rule 4.154 renumbered and amended effective January 1, 2001; adopted as rule 844 effective March 4, 1972.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.160. Policies to be considered before ordering and transferring a criminal case on change of venue

- (a) **[Attempt to impanel jury]** Before ordering a change of venue in a criminal case, the court should consider impaneling a jury that would give the defendant a fair and impartial trial.

(Subd (a) amended effective January 1, 2001; adopted effective July 1, 1989.)

- (b) **[Moving the jury]** After a change of venue has been ordered, the court should determine, pursuant to Penal Code section 1036.7, whether it would be in the interests of the administration of justice to move the jury rather than to move the pending action. In so doing, the court should give particular consideration to the convenience of the jurors.

Rule 4.160 renumbered and amended effective January 1, 2001; adopted as Sec. 4 effective July 1, 1989.

Advisory Committee Comment

Section 4(a) is not intended to imply that the court should attempt to impanel a jury in every case before granting a change of venue. If there is clear evidence of a reasonable likelihood that a fair and impartial trial cannot be had in the county, a change of venue should be ordered.

Drafter's Notes

1989—Section 4(a) states that, before ordering a change of venue in a criminal case, the court should consider attempting to impanel a jury that would give the defendant a fair and impartial trial. An Advisory Committee Comment states that this section is not intended to imply that the court should attempt to impanel a jury in every case before granting a change of venue. Instead, a change of venue should be ordered if there is clear evidence of a reasonable likelihood that a fair and impartial trial cannot be had in the county.

Section 4(b) states that, after a change of venue has been ordered, the court should determine whether it would be in the best interest of the administration of justice to move the jury rather than move the pending action. This procedure has been followed successfully by courts that are in close enough proximity that jurors have not been significantly inconvenienced.

2001—See note following rule 4.100.

Rule 4.161. Change of venue case to be tried by judge from county in which the case originated—criminal cases

A criminal case in which a change of venue has been ordered should be tried in the court receiving the case by a judge from the court in which the case originated, unless the originating and receiving courts agree otherwise.

Rule 4.161 renumbered effective January 1, 2001; adopted as Sec. 4.1 effective July 1, 1989.

Drafter's Notes

1989—Section 4.1 states that, ordinarily, a criminal case in which a change of venue has been ordered should be tried in the court receiving the case by a judge from the court in which the case originated. This standard recognizes the shortage of retired judges available for assignment to the receiving court to ease the burden of trying the case after a change of venue.

2001—See note following rule 4.100.

Rule 4.162. Guidelines for reimbursement of costs in change of venue cases—criminal cases

- (a) **[General]** Consistent with Penal Code section 1037(c), the county in which an action originated shall reimburse the county receiving a case after an order for change of venue for any ordinary expenditure and any extraordinary but reasonable-and-necessary expenditure which would not have been incurred by the receiving county but for the change of venue.

(Subd (a) amended effective January 1, 2001; adopted effective July 1, 1989.)

- (b) **[Reimbursable ordinary expenditures—court related]** Court-related reimbursable ordinary expenses include:

- (1) For prospective jurors on the panel from which the jury is selected and for the trial jurors and alternates seated:
 - (i) Normal juror per diem and mileage at the rates of the receiving county. The cost of the juror should only be charged to a change of venue case if the juror was not used in any other case on the day that juror was excused from the change of venue case.
 - (ii) If jurors are sequestered, actual lodging, meals, mileage, and parking expenses up to state Board of Control limits.

- (iii) If jurors are transported to a different courthouse or county, actual mileage and parking expenses.
- (2) For court reporters:
 - (i) The cost of pro tem reporters, even if not used on the change of venue trial, but not the salaries of regular official reporters who would have been paid in any event. The rate of compensation for pro tem reporters should be that of the receiving county.
 - (ii) The cost of transcripts requested during trial and for any new trial or appeal, using the folio rate of the receiving county.
 - (iii) The cost of additional reporters necessary to allow production of a daily or expedited transcript.
- (3) For assigned judges: The assigned judge's per diem, travel, and other expenses, up to state Board of Control limits, if the judge is assigned to the receiving court because of the change of venue case, regardless of whether the assigned judge is hearing the change of venue case.
- (4) For interpreters and translators:
 - (i) The cost of the services of interpreters and translators, not on the court staff, if those services are required under Evidence Code sections 750 through 754. Using the receiving county's fee schedule, this cost should be paid whether the services are used in a change of venue trial or to cover staff interpreters and translators assigned to the change of venue trial.
 - (ii) Interpreters' and translators' actual mileage, per diem and lodging expenses, if any, which were incurred in connection with the trial, up to state Board of Control limits.
- (5) For maintenance of evidence: The cost of handling, storing, or maintaining evidence beyond the expenses normally incurred by the receiving county.

- (6) For services and supplies: The cost of services and supplies incurred only because of the change of venue trial, for example, copying and printing charges (e.g., juror questionnaires), long-distance telephone calls, and postage. A pro rata share of the costs of routine services and supplies should not be reimbursable.
- (7) For court or county employees:
 - (i) Overtime expenditures and compensatory time for staff incurred because of the change of venue case.
 - (ii) Salaries and benefit costs of extra help or temporary help incurred either because of the change of venue case or to replace staff assigned to the change of venue case.

(Subd (b) amended effective January 1, 1998; adopted effective July 1, 1989.)

(c) **[Reimbursable ordinary expenses—defendant related]** Defendant-related reimbursable ordinary expenses include the actual costs incurred for guarding, keeping, and transporting the defendant, including:

- (1) Expenses related to health care: Costs incurred by or on behalf of the defendant such as doctors, hospital expenses, medicines, therapists, and counseling for diagnosis, evaluation, and treatment.
- (2) Cost of food and special clothing for an in-custody defendant.
- (3) Transportation: Nonroutine expenses, such as transporting an in-custody defendant from the originating county to the receiving county. Routine transportation expenses if defendant is transported by usual means used for other receiving county prisoners should not be reimbursable.

(Subd (c) adopted effective July 1, 1989.)

(d) **[Reimbursable ordinary expenditures—defense expenses]** Reimbursable ordinary expenses related to providing defense for the defendant include:

- (1) Matters covered by Penal Code section 987.9 as determined by the court in which the action originated or by a judge designated under that section.

- (2) Payment of other defense costs in accordance with policies of the county in which the action originated, unless good cause to the contrary is shown to the trial court.
- (3) Unless Penal Code section 987.9 applies, the trial court in the receiving county may, in its sound discretion, approve all trial-related expenses including:
 - (i) Attorney fees for defense counsel and, if any, co-counsel, and actual travel-related expenses, up to state Board of Control limits, for staying in the receiving county during trial and hearings.
 - (ii) Paralegal and extraordinary secretarial or office expenditures of defense counsel.
 - (iii) Expert witness costs and expenses.
 - (iv) The cost of experts assisting in preparation before trial or during trial, for example, persons preparing demonstrative evidence.
 - (v) Investigator expenses.
 - (vi) Defense witness expenses, including reasonable-and-necessary witness fees and travel expenses.

(Subd (d) amended effective January 1, 1998; adopted effective July 1, 1989.)

- (e) **[Extraordinary but reasonable-and-necessary expenses]** Except in emergencies or unless it is impracticable to do so, a receiving county should give notice before incurring any extraordinary expenditures to the county in which the action originated, in accordance with Penal Code section 1037(d). Extraordinary but reasonable-and-necessary expenditures include:
 - (1) Security-related expenditures: The cost of extra security precautions taken because of the risk of escape or suicide or threats of, or the potential for, violence during the trial. These precautions might include, for example, extra bailiffs or correctional officers, special transportation to the courthouse for trial, television monitoring, and security checks of those entering the courtroom.

- (2) Facility remodeling or modification: Alterations to buildings or courtrooms to accommodate the change of venue case.
- (3) Renting or leasing of space or equipment: Renting or leasing of space for courtrooms, offices, and other facilities, or equipment to accommodate the change of venue case.

(Subd (e) amended effective 1998; adopted effective July 1, 1989.)

(f) [Nonreimbursable expenses] Nonreimbursable expenses include:

- (1) Normal operating expenses including the overhead of the receiving county, for example:
 - (i) Salary and benefits of existing county or court staff which would have been paid even if there were no change of venue case.
 - (ii) The cost of operating the jail, for example, detention staff costs, normal inmate clothing, utility costs, overhead costs, and jail construction costs.

These expenditures would have been incurred whether or not the case was transferred to the receiving county. It is, therefore, inappropriate to seek reimbursement from the county in which the action originated.

- (2) Equipment which is purchased and then kept by the receiving county and which can be used for other purposes or cases.

(Subd (f) adopted effective July 1, 1989.)

(g) [Miscellaneous]

- (1) Documentation of costs: No expense should be submitted for reimbursement without supporting documentation, such as a claim, invoice, bill, statement, or time sheet. In unusual circumstances, a declaration under penalty of perjury may be necessary. The declaration should describe the cost and state it was incurred because of the change of venue case. Any required court order or approval of costs also should be sent to the originating court.
- (2) Timing of reimbursement: Unless both counties agree to other terms, reimbursement of all expenses which are not questioned by

the originating county should be made within 60 days of receipt of the claim for reimbursement. Payment of disputed amounts should be made within 60 days of the resolution of the dispute.

(Sub (g) adopted effective July 1, 1989.)

Rule 4.162 renumbered and amended effective January 1, 2001; adopted as Sec. 4.2 effective July 1, 1989; previously amended January 1, 1998.

Drafter's Notes

1989—Section 4.2 contains detailed guidelines for the reimbursement of costs incurred by receiving courts in change of venue cases. The guidelines are designed to prevent disputes that have on occasion occurred between the originating and the receiving court as to responsibility for certain costs connected with the trial of a case. Among other subjects, the guidelines address costs related to jurors, court reporters, assigned judges, interpreters and translators, services and supplies, custody of the defendant, and appointed counsel.

1998—Technical and nonsubstantive changes were made to clarify this standard. In addition, subdivision (e)(4), which provided for reimbursement for the costs of salaries and benefits for regular county or court employees in unusual situations, was repealed because it is inconsistent with Penal Code section 1037(c). Section 1037(c) prohibits reimbursing a county to which venue is changed for normal salaries, overhead, and other expenses that would have been incurred in the county in any event.

2001—See note following rule 4.100.

DIVISION II. Trials

Title Four, Criminal Cases—Division II, Trials, retitled effective January 1, 2001.

Rule 4.200. Pre–voir dire conference in criminal cases

Rule 4.201. Supplemental voir dire in criminal cases

Rule 4.200. Pre–voir dire conference in criminal cases

- (a) **[The conference]** Before jury selection begins in criminal cases, the court shall conduct a conference with counsel to determine:
 - (1) a brief outline of the nature of the case, including a summary of the criminal charges;
 - (2) the names of persons counsel intend to call as witnesses at trial;
 - (3) the People's theory of culpability and the defendant's theories;

- (4) the procedures for deciding requests for excuse for hardship and challenges for cause; and
- (5) the areas of inquiry and specific questions to be asked by the court and, as permitted by the court, by counsel and any time limits on counsel's examination.

The judge shall, if requested, excuse the defendant from then disclosing any defense theory.

- (b) **[Written questions]** The court may require that all questions to be asked of prospective jurors, either orally or by written questionnaire, shall be submitted to the court and opposing counsel in writing before the conference.

Rule 4.200 renumbered and amended effective January 1, 2001; adopted as rule 228.1 effective June 6, 1990.

Advisory Committee Comment:

Use in conjunction with Standard 8.5.

Drafter's Notes

1990—The council adopted new rules 228.1 and 516.1 concerning conferences to be held before jury selection in criminal cases (pre-voir dire conferences) in which certain information shall be exchanged, and concerning the submission of questions for prospective jurors in writing, in advance of the conference. It also adopted new sections 8.6 and 8.8 of the Standards of Judicial Administration, concerning uninterrupted jury selection and judicial education related to jury selection. New rule 228.1 is added to provide for pre-voir dire conferences in criminal cases in the superior court.

2001—See note following rule 4.100.

Rule 4.201. Supplemental voir dire in criminal cases

In criminal jury trials, after completion of the initial examination, the court shall permit counsel to conduct supplemental questioning as provided in Code of Civil Procedure section 223.

Rule 4.201 renumbered and amended effective January 1, 2001; adopted as rule 228.2 effective June 6, 1990.

Drafter's Notes

1990—New rules 228.2 and 516.2 are added to provide for supplemental examinations in criminal cases, and section 8.5(a)(3) of the Standards of Judicial Administration is repealed concerning the same subject.

2001—See note following rule 4.100.

DIVISION III. Sentencing

Title Four, Criminal Cases—Division III, Sentencing—retitled effective January 1, 2001.

Rule 4.300. Commitments to nonpenal institutions

Rule 4.305. Notification of appeal rights in felony cases

Rule 4.306. Notification of appeal rights in misdemeanor and infraction cases

Rule 4.310. Determination of presentence custody time credit

Rule 4.315. Setting date for execution of death sentence

Rule 4.320. Records of criminal convictions (Gov. Code, §§ 69844.5, 71280.5)

Rule 4.325. Ignition interlock orders: “interest of justice” exceptions

Rule 4.300. Commitments to nonpenal institutions

When a defendant is convicted of a crime for which sentence could be imposed under section 1170 and the court orders that he or she be committed to the California Youth Authority pursuant to Welfare and Institutions Code section 1731.5, the order of commitment shall specify the term of imprisonment to which the defendant would have been sentenced. The term shall be determined as provided by sections 1170 and 1170.1 and these rules, as though a sentence of imprisonment were to be imposed.

(Untitled subdivision renumbered effective January 1, 2001; adopted as subd (a) effective July 1, 1977.)

Rule 4.300 amended and renumbered effective January 1, 2001; adopted as rule 453 effective July 1, 1977; previously amended effective July 28, 1977.

Advisory Committee Comment

Youth Authority commitments cannot exceed the maximum possible incarceration in an adult institution for the same crime. *People v. Olivas* (1976) 17 Cal.3d 236. A commitment as an MDSO may not exceed the maximum term of imprisonment for the offenses of which the defendant was convicted. Welfare and Institutions Code section 6316.1 added effective July 1, 1977 (Stats. 1977, ch. 164).

Under the indeterminate sentencing law, the receiving institution knew, as a matter of law from the record of the conviction, the maximum potential period of imprisonment for the crime of which the defendant was convicted.

Under the Uniform Determinate Sentencing Act, the court's discretion as to length of term leaves doubt as to the maximum term when only the record of convictions is present.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.305. Notification of appeal rights in felony cases

After imposing sentence or making an order deemed to be a final judgment in a criminal case upon conviction after trial, or after imposing sentence following a revocation of probation, except where the revocation is after the defendant's admission of violation of probation, the court shall advise the defendant of his or her right to appeal, of the necessary steps and time for taking an appeal, and of the right of an indigent defendant to have counsel appointed by the reviewing court. A reporter's transcript of the proceedings required by this rule shall be forthwith prepared and certified by the reporter and filed with the clerk.

Rule 4.305 renumbered effective January 1, 2001; formerly rule 470, amended and renumbered effective January 1, 1991; adopted as rule 250 effective January 1, 1972; previously amended effective July 1, 1972, and January 1, 1977.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.306. Notification of appeal rights in misdemeanor and infraction cases

After imposing sentence or making an order deemed to be a final judgment in a misdemeanor case upon conviction after trial or following a revocation of probation, the court shall orally or in writing advise a defendant not represented by counsel of the right to appeal, the time for filing a notice of appeal and the right of an indigent defendant to have counsel appointed on appeal. This rule shall not apply to infractions or where a revocation of probation is after the defendant's admission of a violation of probation.

Rule 4.306 renumbered effective January 1, 2001; adopted as rule 535 effective July 1, 1981.

Drafter's Notes

Rule 535 requires that, after trial or revocation of probation of a misdemeanor defendant who is not represented by counsel, the court must advise the defendant, either orally or in writing, of the right to appeal, the time for filing a notice of appeal and the right of an

indigent defendant to have counsel appointed on appeal. The rule does not apply to infractions or where a revocation of probation is after the defendant's admission of a violation of probation.

2001—See note following rule 4.100.

Rule 4.310. Determination of presentence custody time credit

At the time of sentencing, the court shall cause to be recorded on the judgment or commitment the total time in custody to be credited upon the sentence under Penal Code sections 2900.5, 2933.1(c), and 2933.2(c). Upon referral of the defendant to the probation officer for an investigation and report under Penal Code section 1203(a) or 1203(f), or upon setting a date for sentencing in the absence of a referral, the court shall direct the sheriff, probation officer, or other appropriate person to report to the court and notify the defendant or defense counsel and prosecuting attorney within a reasonable time prior to the date set for sentencing as to the number of days that defendant has been in custody and for which he or she may be entitled to credit. Any challenges to the report shall be heard at the time of sentencing.

Rule 4.310 renumbered and amended effective January 1, 2001; adopted as rule 472

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.315. Setting date for execution of death sentence

- (a) **[Open session of court; notice required]** A date for execution of a judgment of death under section 1193 or section 1227 of the Penal Code shall be set at a public session of the court at which the defendant and the people may be represented.

At least 10 days before the session of court at which the date will be set, the court shall mail notice of the time and place of the proceeding by first-class mail, postage prepaid, to the Attorney General, the district attorney, the defendant at the prison address, the defendant's counsel or, if none is known, counsel who most recently represented the defendant on appeal or in postappeal legal proceedings, and the executive director of the California Appellate Project in San Francisco. The clerk shall file a certificate of mailing copies of the notice. The court shall not hold the proceeding or set an execution date unless the record contains a clerk's certificate showing that the notices required by this subdivision were timely mailed.

Unless otherwise provided by statute, the defendant does not have a right to be present in person.

(Subd (a) amended effective July 1, 1990; adopted effective July 1, 1989.)

- (b) [Selection of date; notice]** If, at the announced session of court, the court sets a date for execution of the judgment of death, the court shall mail certified copies of the order setting the date to the warden of the state prison and to the Governor, as required by statute; and shall also, within five days of the making of the order, mail by first-class mail, postage prepaid, certified copies of the order setting the date to each of the persons required to be given notice by subdivision (a). The clerk shall file a certificate of mailing copies of the order.

(Subd (b) adopted effective July 1, 1989.)

Rule 4.315 renumbered effective January 1, 2001; adopted as rule 490 effective July 1, 1989; previously amended effective July 1, 1990.

Drafter's Notes

1989—The Judicial Council adopted rule 490 to require that all interested persons, including counsel for a person sentenced to death, be given notice of the court session at which a date for execution of the sentence will be set, and be given notice of the date in fact set by the trial court. The new rule also provides that the court shall not hold the proceeding or set an execution date unless the record contains a clerk's certificate of the mailing of the required notices.

1990—The council amended rule 490 (setting date for execution of death penalty) to specify that notice to the California Appellate Project shall be sent to its San Francisco office.

2001—See note following rule 4.100.

Rule 4.320. Records of criminal convictions (Gov. Code, §§ 69844.5, 71280.5)

- (a) [Information to be submitted]** In addition to the information that the Department of Justice requires from courts under Penal Code section 13151, each trial court shall also report, electronically or manually, the following information, in the form and manner specified by the Department of Justice:

- (1) Whether the defendant was represented by counsel or waived the right to counsel; and
- (2) In the case of a guilty or nolo contendere plea, whether

- (A) the defendant was advised of and understood the charges,
- (B) the defendant was advised of, understood, and waived the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination, and
- (C) the court found the plea was voluntary and intelligently made.

For purposes of this rule, a change of plea form signed by the defendant, defense counsel if the defendant was represented by counsel, and the judge, and filed with the court is a sufficient basis for the clerk or deputy clerk to report that the requirements of subdivision (2) have been met.

(Subd (a) amended effective January 1, 2001; adopted effective July 1, 1998.)

- (b) **[Certification required]** The reporting clerk or a deputy clerk shall certify that the report submitted to the Department of Justice under Penal Code section 13151 and this rule is a correct abstract of the information contained in the court's records in the case.

Rule 4.320 renumbered and amended effective January 1, 2001; adopted as rule 895 effective July 1, 1998.

Drafter's Notes

1998—This rule was adopted to implement the Criminal Convictions Record Act (Assem. Bill 1387; Stats. 1996, ch. 642), requiring courts to report specified information on all criminal convictions to the Department of Justice. The information will be used to generate records of convictions that are admissible in court to prove prior convictions.

2001—See note following rule 4.100.

Rule 4.325. Ignition interlock installation orders: “interest of justice” exceptions

If the court finds that the interest of justice requires an exception to the Vehicle Code sections 14601(e), 14601.1(d), 14601.4(c), or 14601.5(g) requirements for installation of an ignition interlock device under Vehicle Code section 23575, the reasons for the finding must be stated on the record.

Rule 4.325 renumbered and amended effective January 1, 2001; adopted as rule 530 effective January 1, 1995.

Drafter's Notes

1995—On the recommendation of the Traffic Ad Hoc Advisory Committee, the council: . . . (2) adopted new rule 530 regarding ignition interlock exceptions, as required by Vehicle Code section 23246.

January 2001—See note following rule 4.100.

July 2001—In response to statutory changes, the revised rule correctly references relevant statutes, and also deletes the list of grounds for exceptions to the ignition interlock device requirements.

DIVISION IV. Sentencing—Determinate Sentencing Law

Title Four, Criminal Cases—Division IV, Sentencing-Determinate Sentencing Law—retitled effective January 1, 2001.

Rule 4.401. Authority

Rule 4.403. Applicability

Rule 4.405. Definitions

Rule 4.406. Reasons

Rule 4.407. Rules of construction

Rule 4.408. Criteria not exclusive; sequence not significant

Rule 4.409. Consideration of criteria

Rule 4.410. General objectives in sentencing

Rule 4.411. Presentence investigations and reports

Rule 4.411.5. Probation officer's presentence investigation report

Rule 4.412. Reasons. Agreement to punishment as reason and as abandonment of certain claims

Rule 4.413. Probation eligibility when probation is limited

Rule 4.414. Criteria affecting probation

Rule 4.420. Selection of base term of imprisonment

Rule 4.421. Circumstances in aggravation

Rule 4.423. Circumstances in mitigation

Rule 4.424. Consideration of applicability of section 654

Rule 4.425. Criteria affecting concurrent or consecutive sentences

Rule 4.426. Violent sex crimes

Rule 4.428. Criteria affecting imposition of enhancements

Rule 4.431. Proceedings at sentencing to be reported

Rule 4.433. Matters to be considered at time set for sentencing

Rule 4.435. Sentencing upon revocation of probation

Rule 4.437. Statements in aggravation and mitigation

Rule 4.447. Limitations on enhancements

Rule 4.451. Sentence consecutive to indeterminate term or to term in other jurisdiction

Rule 4.452. Determinate sentence consecutive to prior determinate sentence

Rule 4.453. Commitments to nonpenal institutions

Rule 4.470. Notification of appeal rights in felony cases

Rule 4.472. Determination of presentence custody time credit

Rule 4.480. Judge's statement under Penal Code section 1203.01

Rule 4.401. Authority

The rules in this division are adopted pursuant to Penal Code section 1170.3 and pursuant to the authority granted to the Judicial Council by the Constitution, article VI, section 6, to adopt rules for court administration, practice and procedure.

Rule 4.401 renumbered effective January 1, 2001; adopted as rule 401 effective July 1, 1977.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.403. Applicability

These rules apply only to criminal cases in which the defendant is convicted of one or more offenses punishable as a felony by a determinate sentence imposed pursuant to chapter 4.5 (commencing with § 1170) of Title 7 of Part 2 of the Penal Code.

Rule 4.403 renumbered and amended effective January 1, 2001; adopted as rule 403 effective July 1, 1977.

Advisory Committee Comment

The sentencing rules do not apply to offenses carrying a life term or other indeterminate sentences for which sentence is imposed under new section 1168.

The operative portions of section 1170 deal exclusively with prison sentences; and the mandate to the Judicial Council in section 1170.3 is limited to criteria affecting the length of prison sentences and the grant or denial of probation. Criteria dealing with jail sentences, fines, or jail time and fines as conditions of probation, would substantially exceed the mandate of the legislation.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.405. Definitions

As used in this division, unless the context otherwise requires:

(a) “These rules” means the rules in this division.

(Subd (a) adopted effective July 1, 1977.)

(b) “Base term” is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed.

(Subd (b) adopted effective July 1, 1977.)

(c) “Enhancement” means an additional term of imprisonment added to the base term.

(Subd (c) adopted effective July 1, 1977.)

(d) “Aggravation” or “circumstances in aggravation” means facts which justify the imposition of the upper prison term referred to in section 1170(b).

(Subd (d) adopted effective July 1, 1977.)

(e) “Mitigation” or “circumstances in mitigation” means facts which justify the imposition of the lower of three authorized prison terms or facts which justify the court in declining to impose an enhancement when the court has discretion not to impose it.

(Subd (e) amended effective January 1, 1991; adopted July 1, 1977; previously amended effective July 28, 1977.)

(f) “Sentence choice” means the selection of any disposition of the case which does not amount to a dismissal, acquittal, or grant of a new trial.

(Subd (f) amended effective January 1, 1991; adopted effective July 1, 1977.)

(g) “Section” means a section of the Penal Code.

(Subd (g) adopted effective January 1, 1977.)

(h) “Imprisonment” means confinement in a state prison.

(Subd (h) adopted effective July 1, 1977.)

- (i) “Charged” means charged in the indictment or information.

(Subd (i) adopted effective July 1, 1977.)

- (j) “Found” means admitted by the defendant or found to be true by the trier of fact upon trial.

(Subd (j) adopted effective July 1, 1977.)

Rule 4.405 renumbered effective January 1, 2001; adopted as rule 405 effective July 1, 1977; previously amended effective July 28, 1977, and January 1, 1991.

Advisory Committee Comment

“Base term” is used in section 1170.1(f) to describe the term of imprisonment selected under section 1170(b) from the three possible terms.

“Enhancement.” The facts giving rise to an enhancement, the requirements for pleading and proving those facts, and the court’s authority to strike the additional term are prescribed by statutes. See sections 667.5 (prior prison terms), 1170.1(a) (consecutive prison terms), 12022 (being armed with a firearm or using a deadly weapon), 12022.5 (using a firearm), 12022.6 (excessive taking or damage), 12022.7 (great bodily injury) and 1170.1(e) and (g) (pleading and proof, authority to strike the additional punishment).

“Sentence choice.” Section 1170(c) requires the judge to state reasons for the sentence choice. This general requirement is discussed in rule 406.

“Imprisonment” is distinguished from confinement in other types of facilities.

“Charged” and “found.” Statutes require that the facts giving rise to most enhancements be charged and found. See the comment to the definition of “enhancement.” But the enhancement arising from consecutive sentences results from the sentencing judge’s decision to impose them, and not from a charge or finding.

Drafter’s Notes

2001—See note following rule 4.100.

Rule 4.406. Reasons

- (a) **[How given]** If the sentencing judge is required to give reasons for a sentence choice, the judge shall state in simple language the primary factor or factors that support the exercise of discretion or, if applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It shall be delivered orally on the record.

- (b) **[When reasons required]** Sentence choices that generally require a statement of a reason include:
- (1) granting probation;
 - (2) imposing a prison sentence and thereby denying probation;
 - (3) declining to commit to the Youth Authority an eligible juvenile found amenable for treatment;
 - (4) selecting a term other than the middle statutory term for either an offense or an enhancement;
 - (5) imposing consecutive sentences;
 - (6) imposing full consecutive sentences under section 667.6(c) rather than consecutive terms under section 1170.1(a), when the court has that choice;
 - (7) striking or staying the punishment for an enhancement;
 - (8) imposing both weapons and injury enhancements on a single count under section 1170.1(e);
 - (9) waiving a restitution fine;
 - (10) not committing an eligible defendant to the California Rehabilitation Center; and
 - (11) striking an enhancement or prior conviction allegation under Penal Code section 1385.

(Subd (b) amended effective January 1, 2001; adopted effective January 1, 1991.)

Rule 4.406 renumbered and amended effective January 1, 2001; adopted as rule 406 effective January 1, 1991.

Advisory Committee Comment

This rule is not intended to expand the statutory requirements for giving reasons, and is not an independent interpretation of the statutory requirements.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.407. Rules of construction

As used in these rules:

- (a) “Shall” is mandatory, “should” is advisory, “may” is permissive.

(Subd (a) adopted effective July 1, 1977.)

- (b) The past, present, and future tenses include the others.

(Subd (b) adopted effective July 1, 1977.)

- (c) The singular includes the plural.

(Subd (c) amended effective January 1, 1991.)

Rule 4.407 renumbered effective January 1, 2001; adopted as rule 407 effective July 1, 1977; previously amended effective January 1, 1991.

Drafter’s Notes

2001—See note following rule 4.100.

Rule 4.408. Criteria not exclusive; sequence not significant

- (a) The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.
- (b) The order in which criteria are listed does not indicate their relative weight or importance.

Rule 4.408 renumbered effective January 1, 2001; adopted as rule 408 effective July 1, 1977.

Advisory Committee Comment

Enumerations of criteria in these rules are not exclusive. The variety of circumstances presented in felony cases is so great that no listing of criteria could claim to be all-inclusive. (Cf., Evid. Code, § 351.)

The relative significance of various criteria will vary from case to case. This, like the question of applicability of various criteria, will be decided by the sentencing judge.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.409. Consideration of criteria

Relevant criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise.

Rule 4.409 renumbered effective January 1, 2001; adopted as rule 409 effective July 1, 1977.

Advisory Committee Comment

Relevant criteria are those applicable to the facts in the record of the case; not all criteria will be relevant to each case. The judge's duty is similar to the duty to consider the probation officer's report. Section 1203.

In deeming the sentencing judge to have considered relevant criteria, the rule applies the presumption of Evidence Code, section 664 that official duty has been regularly performed. See *People v. Moran* (1970) 1 Cal.3d 755 (trial court presumed to have considered referring eligible defendant to California Youth Authority in absence of any showing to the contrary, citing Evidence Code, section 664).

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.410. General objectives in sentencing

General objectives of sentencing include:

- (a) Protecting society.
- (b) Punishing the defendant.
- (c) Encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses.
- (d) Deterring others from criminal conduct by demonstrating its consequences.
- (e) Preventing the defendant from committing new crimes by isolating him for the period of incarceration.
- (f) Securing restitution for the victims of crime.

(g) Achieving uniformity in sentencing.

Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge shall consider which objectives are of primary importance in the particular case.

The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case.

Rule 4.410 renumbered effective January 1, 2001; adopted as rule 410 effective July 1, 1977.

Advisory Committee Comment

Statutory expressions of policy include:

Welfare and Institutions Code, section 1820 et seq., which provides a subsidy to counties based on their reduction in prison commitments;

Section 1203(a), which requires that eligible defendants be considered for probation and authorizes probation if circumstances in mitigation are found or justice would be served;

Section 1170(a)(1), which expresses the policies of uniformity, proportionality of prison terms to the seriousness of the offense, and the use of imprisonment as punishment;

Sections 1203.06, 1203.07, 1203.11, 12311 and Health and Safety Code, section 11370, which prohibit the grant of probation in particular cases.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.411. Presentence investigations and reports

- (a) **[Eligible defendant]** If the defendant is eligible for probation, the court shall refer the matter to the probation officer for a presentence investigation and report. Waivers of the presentence report should not be accepted except in unusual circumstances.
- (b) **[Ineligible defendant]** Even if the defendant is not eligible for probation, the court should refer the matter to the probation officer for a presentence investigation and report.

- (c) **[Supplemental reports]** The court shall order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared.
- (d) **[Purpose of presentence investigation report]** Probation officers' reports are used by judges in determining the appropriate length of a prison sentence and by the Department of Corrections in deciding upon the type of facility and program in which to place a defendant, and are also used in deciding whether probation is appropriate. Section 1203c requires a probation officer's report on every person sentenced to prison; ordering the report before sentencing in probation-ineligible cases will help ensure a well-prepared report.

Rule 4.411 renumbered effective January 1, 2001; former rule 411 amended and renumbered effective January 1, 1991; adopted as rule 418 effective July 1, 1977.

Advisory Committee Comment

Section 1203 requires a presentence report in every felony case in which the defendant is eligible for probation. Because such a probation investigation and report are valuable to the judge and to the jail and prison authorities, waivers of the report and requests for immediate sentencing are discouraged, even when the defendant and counsel have agreed to a prison sentence.

Notwithstanding a defendant's statutory ineligibility for probation, a presentence investigation and report should be ordered to assist the court in deciding the appropriate sentence and to facilitate compliance with section 1203c.

This rule does not prohibit pre-conviction, pre-plea reports as authorized by Code of Civil Procedure section 131.3.

Subdivision (c) is based on case law that generally requires a supplemental report if the defendant is to be resentenced a significant time after the original sentencing, as, for example, after a remand by an appellate court, or after the apprehension of a defendant who failed to appear at sentencing. The rule is not intended to expand on the requirements of those cases.

The rule does not require a new investigation and report if a recent report is available and can be incorporated by reference and there is no indication of changed circumstances. This is particularly true if a report is needed only for the Department of Corrections because the defendant has waived a report and agreed to a prison sentence. If a full report was prepared in another case in the same or another jurisdiction within the preceeding six months, during which time the defendant was in custody, and that report is available to the Department of Corrections, it is unlikely that a new investigation is needed.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.411.5. Probation officer's presentence investigation report

- (a) **[Contents]** A probation officer's presentence investigation report in a felony case shall include at least the following:
- (1) A face sheet showing at least:
 - (i) the defendant's name and other identifying data;
 - (ii) the case number;
 - (iii) the crime of which the defendant was convicted;
 - (iv) the date of commission of the crime, the date of conviction, and any other dates relevant to sentencing;
 - (v) the defendant's custody status; and
 - (vi) the terms of any agreement upon which a plea of guilty was based.
 - (2) The facts and circumstances of the crime and the defendant's arrest, including information concerning any co-defendants and the status or disposition of their cases. The source of all such information shall be stated.
 - (3) A summary of the defendant's record of prior criminal conduct, including convictions as an adult and sustained petitions in juvenile delinquency proceedings. Records of an arrest or charge not leading to a conviction or the sustaining of a petition shall not be included unless supported by facts concerning the arrest or charge.
 - (4) Any statement made by the defendant to the probation officer, or a summary thereof, including the defendant's account of the circumstances of the crime.
 - (5) Information concerning the victim of the crime, including:
 - (i) the victim's statement or a summary thereof, if available;
 - (ii) the amount of the victim's loss, and whether or not it is covered by insurance; and

- (iii) any information required by law.
- (6) Any relevant facts concerning the defendant's social history, including but not limited to those categories enumerated in Penal Code section 1203.10, organized under appropriate subheadings, including, whenever applicable, "Family," "Education," "Employment and income," "Military," "Medical/psychological," "Record of substance abuse or lack thereof," and any other relevant subheadings.
- (7) Collateral information, including written statements from:
 - (i) official sources such as defense and prosecuting attorneys, police (subsequent to any police reports used to summarize the crime), probation and parole officers who have had prior experience with the defendant, and correctional personnel who observed the defendant's behavior during any period of presentence incarceration; and
 - (ii) interested persons, including family members and others who have written letters concerning the defendant.
- (8) An evaluation of factors relating to disposition. This section shall include:
 - (i) a reasoned discussion of the defendant's suitability and eligibility for probation, and if probation is recommended, a proposed plan including recommendation for the conditions of probation and any special need for supervision;
 - (ii) if a prison sentence is recommended or is likely to be imposed, a reasoned discussion of aggravating and mitigating factors affecting the sentence length; and
 - (iii) a discussion of the defendant's ability to make restitution, pay any fine or penalty which may be recommended, or satisfy any special conditions of probation which are proposed.

Discussions of factors affecting suitability for probation and affecting the sentence length shall refer to any sentencing rule directly relevant to

the facts of the case, but no rule shall be cited without a reasoned discussion of its relevance and relative importance.

- (9) The probation officer's recommendation. When requested by the sentencing judge or by standing instructions to the probation department, the report shall include recommendations concerning the length of any prison term that may be imposed, including the base term, the imposition of concurrent or consecutive sentences, and the imposition or striking of the additional terms for enhancements charged and found.
- (10) Detailed information on presentence time spent by the defendant in custody, including the beginning and ending dates of the period(s) of custody; the existence of any other sentences imposed on the defendant during the period of custody; the amount of good behavior, work, or participation credit to which the defendant is entitled; and whether the sheriff or other officer holding custody, the prosecution, or the defense wishes a hearing be held for the purposes of denying good behavior, work, or participation credit.
- (11) A statement of mandatory and recommended restitution, restitution fines, other fines, and costs to be assessed against the defendant, including chargeable probation services and attorney fees under section 987.8 when appropriate, findings concerning the defendant's ability to pay, and a recommendation whether any restitution order shall become a judgment under section 1203(j) if unpaid.

(Subd (a) amended effective January 1, 1991; adopted effective July 1, 1981.)

- (b) **[Format]** The report shall be on paper 8-1/2 by 11 inches in size and shall follow the sequence set out in subdivision (a) to the extent possible.

(Subd (b) amended effective January 1, 1991; adopted effective July 1, 1981.)

- (c) **[Sources]** The source of all information shall be stated. Any person who has furnished information included in the report shall be identified by name or official capacity unless a reason is given for not disclosing the person's identity.

(Subd (c) amended effective January 1, 1991; adopted effective July 1, 1981.)

Rule 411.5 renumbered effective January 1, 2001; former rule 411.5 amended and renumbered effective January 1, 1991; adopted as rule 419 effective July 1, 1981.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.412. Reasons. Agreement to punishment as reason and as abandonment of certain claims

- (a) **[Defendant's agreement as reason]** It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it. The agreement and lack of objection shall be recited on the record. This section does not authorize a sentence that is not otherwise authorized by law.

(Subd (a) amended effective January 1, 2001; adopted effective January 1, 1991.)

- (b) **[Agreement to sentence abandons 654 claim]** By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record.

(Subd (b) adopted effective January 1, 1991.)

Rule 4.412 renumbered and amended effective January 1, 2001; adopted as rule 412 effective January 1, 1991; see also former rule 440.

Advisory Committee Comment

See former rule 440.

Subdivision (a) is intended to relieve the court of an obligation to give reasons if the sentence or other disposition is one that the defendant has accepted and to which the prosecutor expresses no objection. The judge may choose to give reasons for the sentence even though not obligated to do so.

Judges should also be aware that there may be statutory limitations on "plea bargaining" or on the entry of a guilty plea on the condition that no more than a particular sentence will be imposed. At the time this comment was drafted, such limitations appeared, for example, in sections 1192.5 and 1192.7.

Subdivision (b) is based on the fact that a defendant who, with the advice of counsel, expresses agreement to a specified prison term normally is acknowledging that the term is

appropriate for his or her total course of conduct. This subdivision applies both to determinate and indeterminate terms.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.413. Probation eligibility when probation is limited

- (a) **[Consideration of eligibility]** The court shall determine whether the defendant is eligible for probation.

(Subd (a) adopted January 1, 1991.)

- (b) **[Probation in unusual cases]** If the defendant comes under a statutory provision prohibiting probation “except in unusual cases where the interests of justice would best be served,” or a substantially equivalent provision, the court should apply the criteria in subdivision (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in rule 414 to decide whether to grant probation.

(Subd (b) adopted effective January 1, 1991.)

- (c) **[Facts showing unusual case]** The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

- (1) *(Facts relating to basis for limitation on probation)* A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:
- (i) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence.
 - (ii) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

- (2) *(Facts limiting defendant's culpability)* A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:
- (i) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence.
 - (ii) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation.
 - (iii) The defendant is youthful or aged, and has no significant record of prior criminal offenses.

(Subd (c) adopted effective January 1, 1991.)

Rule 4.413 renumbered effective January 1, 2001; adopted as rule 413 effective January 1, 1991.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.414. Criteria affecting probation

Criteria affecting the decision to grant or deny probation include:

- (a) Facts relating to the crime, including:
- (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime.
 - (2) Whether the defendant was armed with or used a weapon.
 - (3) The vulnerability of the victim.
 - (4) Whether the defendant inflicted physical or emotional injury.
 - (5) The degree of monetary loss to the victim.

- (6) Whether the defendant was an active or passive participant.
- (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.
- (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant.
- (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.

(Subd (a) amended effective January 1, 1991.)

(b) Facts relating to the defendant, including:

- (1) Prior record of criminal conduct; whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct.
- (2) Prior performance on probation or parole and present probation or parole status.
- (3) Willingness to comply with the terms of probation.
- (4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors.
- (5) The likely effect of imprisonment on the defendant and his or her dependents.
- (6) The adverse collateral consequences on the defendant's life resulting from the felony conviction.
- (7) Whether the defendant is remorseful.
- (8) The likelihood that if not imprisoned the defendant will be a danger to others.

(Subd (b) amended effective January 1, 1991.)

Rule 4.414 renumbered effective January 1, 2001; former rule 414 amended and relettered effective January 1, 1991; adopted effective July 1, 1977.

Advisory Committee Comment

The sentencing judge's discretion to grant probation is unaffected by the Uniform Determinate Sentencing Act (§1170(a)(2)).

The decision whether to grant probation is normally based on an overall evaluation of the likelihood that the defendant will live successfully in the general community. Each criterion points to evidence that the likelihood of success is great or small. A single criterion will rarely be determinative; in most cases, the sentencing judge will have to balance favorable and unfavorable facts.

Under criterion (d)(3) ("willingness and ability") it is appropriate to consider the defendant's expressions of willingness to comply and their apparent sincerity, and whether the defendant's home and work environment and primary associates will be supportive of his efforts to comply with the terms of probation, among other factors.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.420. Selection of base term of imprisonment

- (a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(Subd (a) amended effective January 1, 1991; previously amended effective July 28, 1977.)

- (b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(Subd (b) amended effective January 1, 1991; previously amended effective July 28, 1977.)

- (c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(Subd (c) adopted effective January 1, 1991.)

- (d) A fact that is an element of the crime shall not be used to impose the upper term.

(Subd (d) adopted effective January 1, 1991.)

- (e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

(Subd (e) amended and relettered effective January 1, 1991; previously amended effective July 28, 1977.)

Rule 4.420 renumbered effective January 1, 2001; former rule 420 amended and renumbered effective January 1, 1991; adopted as rule 439 effective July 1, 1977; previously amended effective July 28, 1977.

Advisory Committee Comment [Revised 1990]

As amended by Assembly Bill No. 476 (Stats. 1977, ch. 165), the determinate sentencing law authorizes the court to select any of the three possible prison terms even though neither party has requested a deviation from the middle term by formal motion or informal argument. Section 1170(b) retains the requirement, however, that the middle term be selected unless there are circumstances in aggravation or mitigation of the crime, and requires that the court set forth on the record the facts and reasons for imposing the upper or lower term.

Thus, the sentencing judge has authority to impose the upper or lower term on his or her own initiative, if circumstances justifying that choice appear upon an evaluation of the record as a whole.

The legislative intent is that, if imprisonment is the sentence choice, the middle term is to constitute the average or usual term. The rule clarifies this intent by specifying that the presence of circumstances justifying the upper or lower term must be established by a preponderance of the evidence, and that those circumstances must outweigh offsetting circumstances. Proof by a preponderance of the evidence is the standard in the absence of a statute or a decisional law to the

contrary (Evid.Code, § 115), and appears appropriate here, since there is no requirement that sentencing decisions be based on the same quantum of proof as is required to establish guilt. See *Williams v. New York* (1949) 337 U.S. 241.

Determining whether circumstances in aggravation or mitigation preponderate is a qualitative, rather than a quantitative, process. It cannot be determined by simply counting identified circumstances of each kind.

Present law prohibits dual punishment for the same act (or fact) but permits the same act or fact to be considered in denying probation and in selecting the upper prison term. *People v. Edwards* (1976) 18 Cal.3d 796 (prior felony conviction, an element of the offense, also brought defendant within former section 1203(d)(2) limitation on probation to person with prior felony convictions), citing *People v. Perry* (1974) 42 Cal.App.3d 451, 460, and other cases.

The rule makes it clear that a fact charged and found as an enhancement may, in the alternative, be used in aggravation.

Note that under section 1170(b) and rule 405 (definitions), the additional term resulting from ordering sentences to be served consecutively is an "enhancement." Section 1170(b) therefore prohibits using the same fact as the reason for imposing consecutive sentences and as the reason for imposing the upper term. *People v. Avalos* (1984) 37 Cal.3d 316, 233. Subdivision (c) applies to that case as well as to enhancements arising from facts charged and found.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include:

- (a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:
 - (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.
 - (2) The defendant was armed with or used a weapon at the time of the commission of the crime.
 - (3) The victim was particularly vulnerable.
 - (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

- (5) The defendant induced a minor to commit or assist in the commission of the crime.
- (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.
- (7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.
- (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.
- (9) The crime involved an attempted or actual taking or damage of great monetary value.
- (10) The crime involved a large quantity of contraband.
- (11) The defendant took advantage of a position of trust or confidence to commit the offense.

(Subd (a) amended effective January 1, 1991.)

(b) Facts relating to the defendant, including the fact that:

- (1) The defendant has engaged in violent conduct which indicates a serious danger to society.
- (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.
- (3) The defendant has served a prior prison term.
- (4) The defendant was on probation or parole when the crime was committed.
- (5) The defendant's prior performance on probation or parole was unsatisfactory.

(Subd (b) amended effective January 1, 1991.)

(c) Any other facts statutorily declared to be circumstances in aggravation.

(Subd (c) adopted effective January 1, 1991.)

Rule 4.421 renumbered effective January 1, 2001; adopted as rule 421 effective July 1, 1977; previously amended effective January 1, 1991.

Advisory Committee Comment

Circumstances in aggravation may justify imposition of the upper of three possible prison terms. (Section 1170(b).)

The list of circumstances in aggravation includes some facts which, if charged and found, may be used to enhance the sentence. The rule does not deal with the dual use of the facts; the statutory prohibition against dual use is included, in part, in rule 420.

Conversely, such facts as infliction of bodily harm, being armed with or using a weapon, and a taking or loss of great value may be circumstances in aggravation even if not meeting the statutory definitions for enhancements.

Facts concerning the defendant's prior record and personal history may be considered. By providing that the defendant's prior record and simultaneous convictions of other offenses may not be used both for enhancement and in aggravation, section 1170(b) indicates that these and other facts extrinsic to the commission of the crime may be considered in aggravation in appropriate cases. This resolves whatever ambiguity may arise from the phrase "circumstances in aggravation . . . of the crime." The phrase "circumstances in aggravation or mitigation of the crime" necessarily alludes to extrinsic facts.

Refusal to consider the personal characteristics of the defendant in imposing sentence would also raise serious constitutional questions. The California Supreme Court has held that sentencing decisions must take into account "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." *In re Rodriguez* (1975) 14 Cal.3d 639, 654, quoting *In re Lynch* (1972) 8 Cal.3d 410, 425. In *In re Rodriguez* the court released petitioner from further incarceration because "[I]t appears that neither the circumstances of his offense nor his personal characteristics establish a danger to society sufficient to justify such a prolonged period of imprisonment." (*Id.* at 655.) (Footnote omitted, emphasis added.) "For the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." (*Pennsylvania v. Ashe* (1937) 302 U.S. 51, 55, quoted with approval in *Gregg v. Georgia* (1976) 428 U.S. 153, 49 L.Ed.2d 859, 883.)

The scope of "circumstances in aggravation or mitigation" under section 1170(b) is, therefore, coextensive with the scope of inquiry under the similar phrase in section 1203.

The 1990 amendments to this rule and the comment included the deletion of most section numbers. These changes recognize changing statutory section numbers and the fact that there are numerous additional code sections related to the rule, including numerous statutory enhancements enacted since the rule was originally adopted.

Former subdivision (a)(4), concerning multiple victims, was deleted to avoid confusion; cases in which that possible circumstance in aggravation was relied on were frequently reversed on appeal because there was only a single victim in a particular count.

Old age or youth of the victim may be circumstances in aggravation; see section 1170.85(b). Other statutory circumstances in aggravation are listed, for example, in sections 1170.7, 1170.71, 1170.75, 1170.8, and 1170.85.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include:

- (a) Facts relating to the crime, including the fact that:
 - (1) The defendant was a passive participant or played a minor role in the crime.
 - (2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.
 - (3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.
 - (4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.
 - (5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.
 - (6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.
 - (7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.
 - (8) The defendant was motivated by a desire to provide necessities for his or her family or self.

- (9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(Subd (a) amended effective July 1, 1993; previously amended effective January 1, 1991.)

(b) Facts relating to the defendant, including the fact that:

- (1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.
- (2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.
- (3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.
- (4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.
- (5) The defendant made restitution to the victim.
- (6) The defendant's prior performance on probation or parole was satisfactory.

(Subd (b) amended effective January 1, 1991.)

Rule 4.423 renumbered effective January 1, 2001; adopted as rule 423 effective July 1, 1977; previously amended effective January 1, 1991, and July 1, 1993.

Note

Stats. 1992, ch. 1137 provides:

SECTION 1. The Legislature recommends that the Judicial Council revise Rule 423 of the California Rules of Court before June 1, 1993, to add language related to circumstances in mitigation, as follows:

Facts relating to the crime and to the defendant, including the fact that there is evidence, that did not amount to a defense, that the defendant suffered from repeated or continuous

physical, sexual, or psychological abuse committed by the victim and the crime was an offense against the defendant's spouse, any person with whom the defendant was intimately cohabiting, or any person who was the mother or father of the defendant's child.

Advisory Committee Comment

See comment to rule 421.

This rule applies both to mitigation for purposes of motions under section 1170(b) and to circumstances in mitigation justifying the court in striking or specifically not ordering the additional punishment provided as an enhancement.

Some listed circumstances can never apply to certain enhancements; for example, "the amounts taken were deliberately small" can never apply to an excessive taking under section 12022.6, and "no harm was done" can never apply to intentional infliction of great bodily injury under section 12022.7. In any case, only the facts present may be considered for their possible effect in mitigation.

See also rule 409; only relevant criteria need be considered.

Since only the fact of restitution is considered relevant to mitigation, no reference to the defendant's financial ability is needed. The omission of a comparable factor from rule 421 as a circumstance in aggravation is deliberate.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.424. Consideration of applicability of section 654

Prior to determining whether to impose either concurrent or consecutive sentences on all counts on which the defendant was convicted, the court shall determine whether the proscription in section 654 against multiple punishments for the same act or omission requires a stay of imposition of sentence on some of the counts.

Rule 4.424 renumbered effective January 1, 2001; adopted as rule 424 effective January 1, 1991.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.425. Criteria affecting concurrent or consecutive sentences

Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

- (a) **[Criteria relating to crimes]** Facts relating to the crimes, including whether or not:
- (1) The crimes and their objectives were predominantly independent of each other.
 - (2) The crimes involved separate acts of violence or threats of violence.
 - (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

(Subd (a) amended effective January 1, 1991.)

- (b) **[Other criteria and limitations]** Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except
- (i) a fact used to impose the upper term,
 - (ii) a fact used to otherwise enhance the defendant's prison sentence, and
 - (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences.

(Subd (b) amended effective January 1, 1991.)

Rule 4.425 renumbered effective January 1, 2001; adopted as rule 425 effective July 1, 1977; previously amended effective January 1, 1991.

Advisory Committee Comment

The sentencing judge should be aware that there are some cases in which the law mandates consecutive sentences.

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.426. Violent sex crimes

- (a) **[Multiple violent sex crimes]** When a defendant has been convicted of multiple violent sex offenses as defined in section 667.6, the sentencing

judge shall determine whether the crimes involved separate victims or the same victim on separate occasions.

- (1) *(Different victims)* If the crimes were committed against different victims, a full, separate, and consecutive term shall be imposed for a violent sex crime as to each victim, under section 667.6(d).
 - (2) *(Same victim, separate occasions)* If the crimes were committed against a single victim, the sentencing judge shall determine whether the crimes were committed on separate occasions. In determining whether there were separate occasions, the sentencing judge shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. A full, separate, and consecutive term shall be imposed for each violent sex offense committed on a separate occasion under section 667.6(d).
- (b) **[Same victim, same occasion; other crimes]** If the defendant has been convicted of multiple crimes, including at least one violent sex crime, as defined in section 667.6, or if there have been multiple violent sex crimes against a single victim on the same occasion and the sentencing court has decided to impose consecutive sentences, the sentencing judge shall then determine whether to impose a full, separate, and consecutive sentence under section 667.6(c) for the violent sex crime or crimes in lieu of including the violent sex crimes in the computation of the principal and subordinate terms under section 1170.1(a). A decision to impose a fully consecutive sentence under section 667.6(c) is an additional sentence choice which requires a statement of reasons separate from those given for consecutive sentences, but which may repeat the same reasons. The sentencing judge is to be guided by the criteria listed in rule 425, which incorporates rules 421 and 423, as well as any other reasonably related criteria as provided in rule 408.

Rule 4.426 renumbered effective January 1, 2001; adopted as rule 426 effective January 1, 1991.

Advisory Committee Comment

Section 667.6(d) requires a full, separate, and consecutive term for each of the enumerated violent sex crimes that involve separate victims, or the same victim on separate occasions. Therefore, if there were separate victims or the court found that there were separate occasions, no other reasons are required.

If there have been multiple convictions involving at least one of the enumerated violent sex crimes, the court may impose a full, separate, and consecutive term for each violent sex crime under section 667.6(c). (See *People v. Coleman* (1989) 48 Cal.3d 112, 161.) A fully consecutive sentence under section 667.6(c) is an enhancement, which requires a statement of reasons. (See *People v. Price* (1984) 151 Cal.App.3d 803, 815-816.) The court may not use the same fact to impose a sentence pursuant to section 667.6(c) that was used to impose an upper term. (See §1170(b); rule 441(c).) If the court selects the upper term, imposes consecutive sentences, and utilizes section 667.6(c), the record must reflect three sentencing choices with three separate statements of reasons, but the same reason may be used for sentencing under section 667.6(c) and to impose consecutive sentences. (See *People v. Belmontes* (1983) 34 Cal.3d 335, 347-349.)

Drafter's Notes

2001—See note following rule 4.100.

Rule 4.428. Criteria affecting imposition of enhancements

- (a) **[Imposing or not imposing enhancement]** No reason need be given for imposing a term for an enhancement that was charged and found true.

If the judge has statutory discretion to strike the additional term for an enhancement, the court may consider and apply any of the circumstances in mitigation enumerated in these rules or, pursuant to rule 408, any other reasonable circumstances in mitigation that are present.

The judge should not strike the allegation of the enhancement.

(Subd (a) adopted effective January 1, 1991.)

- (b) **[Choice from among three possible terms]** When the defendant is subject to an enhancement that was charged and found true for which three possible terms are specified by statute, the middle term shall be imposed unless there are circumstances in aggravation or mitigation or unless, under statutory discretion, the judge strikes the additional term for the enhancement.

The upper term may be imposed for an enhancement based on any of the circumstances in aggravation enumerated in these rules or, under rule 408, any other reasonable circumstances in aggravation that are present. The lower term may be imposed based upon any of the circumstances in mitigation enumerated in these rules or, under rule 408, any other reasonable circumstances in mitigation that are present.

(Subd (b) amended effective January 1, 1998; adopted effective January 1, 1991.)

Rule 4.428 renumbered effective January 1, 2001; adopted as rule 428 effective January 1, 1991; previously amended effective January 1, 1998.

Advisory Committee Comment

Subdivision (b) is intended to apply whether or not the statute expressly makes the middle term the presumptive term for the enhancement.

Case law requires a statement of reasons when multiple enhancements are imposed under section 1170.1(e).

Drafter's Note

1998—Subdivision (b) was amended to remove a phrase limiting the aggravating factors a court may consider in deciding what term to impose for an enhancement. The phrase limited the factors to those that relate directly to the fact giving rise to the enhancement. The California Supreme Court's decision, in *People v. Hall* (1994) 8 Cal.4th 950, invalidated that limitation.

2001—See note following rule 4.100.

Rule 4.431. Proceedings at sentencing to be reported

All proceedings at the time of sentencing shall be reported.

Rule 4.431 renumbered effective January 1, 2001; adopted as rule 431 effective July 1, 1977.

Advisory Committee Comment

Reporters' transcripts of the sentencing proceedings are required on appeal (rule 33(a)(2)), and when the defendant is sentenced to prison (§ 1203.01).

Drafter's Note

2001—See note following rule 4.100.

Rule 4.433. Matters to be considered at time set for sentencing

- (a) In every case, at the time set for sentencing pursuant to section 1191, the sentencing judge shall hold a hearing at which the judge shall:
 - (1) Hear and determine any matters raised by the defendant pursuant to section 1201.
 - (2) Determine whether a defendant who is eligible for probation should be granted or denied probation, unless consideration of

probation is expressly waived by the defendant personally and by counsel.

(Subd (a) adopted effective July 1, 1977.)

- (b)** If the imposition of sentence is to be suspended during a period of probation after a conviction by trial, the trial judge shall make factual findings as to circumstances which would justify imposition of the upper or lower term if probation is later revoked, based upon evidence admitted at the trial.

(Subd (b) amended effective July 28, 1977; adopted effective July 1, 1977.)

- (c)** If a sentence of imprisonment is to be imposed, or if the execution of a sentence of imprisonment is to be suspended during a period of probation, the sentencing judge shall:

- (1) Hear evidence in aggravation and mitigation, and determine, pursuant to section 1170(b), whether to impose the upper, middle or lower term; and set forth on the record the facts and reasons for imposing the upper or lower term.
- (2) Determine whether any additional term of imprisonment provided for an enhancement charged and found shall be stricken.
- (3) Determine whether the sentences shall be consecutive or concurrent if the defendant has been convicted of multiple crimes.
- (4) Determine any issues raised by statutory prohibitions on the dual use of facts and statutory limitations on enhancements, as required in rules 441 and 447.
- (5) Pronounce the court's judgment and sentence, stating the terms thereof and giving reasons for those matters for which reasons are required by law.

(Subd (c) amended effective July 28, 1977; adopted effective July 1, 1977.)

- (d)** All these matters shall be heard and determined at a single hearing unless the sentencing judge otherwise orders in the interests of justice.

(Subd (d) adopted effective July 1, 1977.)

- (e) When a sentence of imprisonment is imposed under subdivision (c) or under rule 435, the sentencing judge shall inform the defendant, pursuant to section 1170(c), of the parole period provided by section 3000 to be served after expiration of the sentence in addition to any period of incarceration for parole violation.

(Subd (e) amended effective January 1, 1979; adopted effective July 1, 1977; previously amended effective July 28, 1977.)

Rule 4.433 renumbered effective January 1, 2001; adopted as rule 433 effective July 1, 1977; previously amended effective July 28, 1977 and January 1, 1979.

Advisory Committee Comment

This rule summarizes the questions which the court is required to consider at the time of sentencing, in their logical order.

Subdivision (a)(2) makes it clear that probation should be considered in every case, without the necessity of any application for probation, unless the defendant is ineligible pursuant to sections 1203.06, 1203.07, 1203.11, 12311 or Health and Safety Code section 11370.

Pursuant to the last sentence in section 1170(b), under subdivision (b), when imposition of sentence is to be suspended, the sentencing judge is not to make any determinations as to possible length of a prison term upon violation of probation. If there was a trial, however, he must make findings as to circumstances justifying the upper or lower term based on the trial evidence.

Subdivision (d) makes it clear that all sentencing matters should be disposed of at a single hearing unless strong reasons exist for a continuance.

Drafter's Note

2001—See note following rule 4.100.

Rule 4.435. Sentencing upon revocation of probation

- (a) When the defendant violates the terms of probation or is otherwise subject to revocation of probation, the sentencing judge may make any disposition of the case authorized by statute.

(Subd (a) amended effective January 1, 1991.)

- (b) Upon revocation and termination of probation pursuant to section 1203.2, when the sentencing judge determines that the defendant shall be committed to prison:
 - (1) If the imposition of sentence was previously suspended, the judge shall impose judgment and sentence after considering any findings

previously made and hearing and determining the matters enumerated in rule 433(c).

The length of the sentence shall be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term nor in deciding whether to strike or specifically not order the additional punishment for enhancements charged and found.

- (2) If the execution of sentence was previously suspended, the judge shall order that the judgment previously pronounced be in full force and effect and that the defendant be committed to the custody of the Director of Corrections for the term prescribed in that judgment.

Rule 4.435 renumbered effective January 1, 2001; adopted as rule 435 effective July 1, 1977; previously amended effective January 1, 1991.

Advisory Committee Comment

Subdivision (a) makes it clear that there is no change in the court's power, upon finding cause to revoke and terminate probation under section 1203.2(a), to continue the defendant on probation.

The restriction of subdivision (b)(1) is based on *In re Rodriguez* (1975) 14 Cal.3d 639, 652: "[T]he primary term must reflect the circumstances existing at the time of the offense."

A judge imposing a prison sentence upon revocation of probation will have the power granted by section 1170(d) to recall the commitment on his or her own motion within 120 days after the date of commitment, and the power under section 1203.2(e) to set aside the revocation of probation, for good cause, within 30 days after the court has notice that execution of the sentence has commenced.

Consideration of conduct occurring subsequent to the granting of probation should be distinguished from consideration of pre-probation conduct that is discovered subsequent to the granting of an order of probation and prior to sentencing following a revocation and termination of probation. If the pre-probation conduct affects or nullifies a determination made at the time probation was granted, the pre-probation conduct may properly be considered at sentencing following revocation and termination of probation. (See *People v. Griffith* (1984) 153 Cal.App.3d 796, 801.)

Drafter's Note

2001—See note following rule 4.100.

Rule 4.437. Statements in aggravation and mitigation

- (a) Statements in aggravation and mitigation referred to in section 1170(b) shall be filed and served at least four days prior to the time set for sentencing pursuant to section 1191 or the time set for pronouncing judgment upon revocation of probation pursuant to section 1203.2(c) if imposition of sentence was previously suspended.
- (b) A party seeking consideration of circumstances in aggravation or mitigation may file and serve a statement pursuant to section 1170(b) and this rule.
- (c) A statement in aggravation or mitigation shall include:
 - (1) A summary of facts which the party relies upon as circumstances in aggravation or mitigation justifying imposition of the upper or lower term.
 - (2) Notice of intention to dispute facts or offer evidence in aggravation or mitigation at the sentencing hearing. The statement shall generally describe the evidence to be offered, including a description of any documents and the names and expected substance of the testimony of any witnesses. No evidence in aggravation or mitigation may be introduced at the sentencing hearing unless it was described in the statement, or unless its admission is permitted by the sentencing judge in the interests of justice.
- (d) Assertions of fact in a statement in aggravation or mitigation shall be disregarded unless they are supported by the record in the case, the probation officer's report or other reports properly filed in the case, or other competent evidence.
- (e) **[Disputed facts]** In the event the parties dispute the facts upon which the conviction rested, the court shall conduct a presentence hearing and make appropriate corrections, additions, or deletions in the presentence probation report or order a revised report.

(Subd (e) adopted effective January 1, 1991.)

Rule 4.437 renumbered effective January 1, 2001; adopted as rule 437 effective July 1, 1977; previously amended July 28, 1977, and January 1, 1991.

Advisory Committee Comment

Section 1170(b) as amended by Assembly Bill No. 476 (Stats. 1977, ch. 165) states in part:

At least four days prior to the time set for imposition of sentence either party may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts.

This provision means that the statement is a document giving notice of intention to dispute facts in the record or the probation officer's report, or to present additional facts.

The statement itself cannot be the medium for presenting new facts, or for rebutting facts already presented by competent evidence, because the statement is a unilateral presentation by one party or counsel which will not necessarily have any indicia of reliability. To allow its factual assertions to be considered in the absence of corroborating evidence would, therefore, constitute a denial of due process of law in violation of the United States (Amendment 14) and California (Art. 1, §7) Constitutions.

"[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence" *Gardner v. State of Florida* (1977) 430 U.S. 349, 358.

The use of probation officers' reports is permissible because they are trained objective investigators. *Williams v. New York* (1949) 337 U.S. 241. Compare sections 1203 and 1204. *People v. Peterson* (1973) 9 Cal.3d 717, 727, expressly approved the holding of *United States v. Weston* (9th Cir. 1971) 448 F.2d 626 that due process is offended by sentencing on the basis of unsubstantiated allegations which were denied by the defendant. Cf., *In re Hancock* (1977) 67 Cal.App.3d 943, 949.

The requirement that the statement include notice of intention to rely on new evidence will enhance fairness to both sides by avoiding surprise and helping to assure that the time limit on pronouncing sentence is met.

Drafter's Note

2001—See note following rule 4.100.

Rule 4.447. Limitations on enhancements

No finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds limitations on the overall aggregate term, such as limits on subordinate terms or limitations on the imposition of multiple enhancements. The sentencing judge shall impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay shall become permanent upon the defendant's service of the portion of the sentence not stayed.

Rule 4.447 amended and renumbered effective January 1, 2001; adopted as rule 447 effective July 1, 1977; previously amended effective July 28, 1977, and January 1, 1991.

Advisory Committee Comment

When consecutive terms are imposed, section 1170.1(a) prohibits applying enhancements to the “subordinate terms” for crimes which are not listed in section 667.5(c), but directs inclusion of one-third of the enhancement under section 12022, 12022.5 or 12022.7 in the “subordinate terms” for crimes listed in section 667.5(c).

Section 1170.1(d) permits imposing both a 12022.7 and either a 12022 or a 12022.5 enhancement to a count for actual or attempted robbery, rape or burglary. In other cases, it permits application of only the greatest one enhancement under sections 12022, 12022.5 and 12022.7 to a single offense, even though more than one might have been charged and found.

Section 1170.1(a) limits the aggregate of enhancements for consecutive terms for crimes not listed in section 667.5(c) to five years.

Section 1170.1(f) limits the aggregate prison term (base term plus enhancements), to double the base term, with specified exceptions.

Present practice of staying execution is followed to avoid violating a statutory prohibition or exceeding the statutory maximum, while preserving the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence. See *People v. Niles* (1964) 227 Cal.App.2d 749, 756.

Only the portion of a sentence or component thereof that exceeds a maximum is prohibited, and this rule provides a procedure for that situation.

Drafter’s Note

2001—See note following rule 4.100.

Rule 4.451. Sentence consecutive to indeterminate term or to term in other jurisdiction

- (a) When a defendant is sentenced under section 1170 and the sentence is to run consecutively to a sentence imposed under section 1168 in the same or another proceeding, the judgment shall specify the determinate term imposed under section 1170 computed without reference to the indeterminate sentence, shall order that the determinate term shall be served consecutive to the sentence under section 1168, and shall identify the proceedings in which the indeterminate sentence was imposed. The term under section 1168, and the date of its completion or parole date, and the sequence in which the sentences are deemed served, will be determined by correctional authorities as provided by law.

(Subd (a) amended effective January 1, 1979; adopted effective July 1, 1977.)

- (b) When a defendant is sentenced under section 1170 and the sentence is to run consecutively to a sentence imposed by a court of the United States or of another state or territory, the judgment shall specify the determinate term imposed under section 1170 computed without reference to the sentence imposed by the other jurisdiction, shall order that the determinate term shall be served commencing upon the completion of the sentence imposed by the other jurisdiction, and shall identify the other jurisdiction and the proceedings in which the other sentence was imposed.

(Subd (b) adopted effective July 1, 1977.)

Rule 4.451 renumbered effective January 1, 2001; adopted as rule 451 effective July 1, 1977; previously amended effective January 1, 1979.

Advisory Committee Comment

The provisions of section 1170.1(a) limiting consecutive terms to a “subordinate term” consisting of one-third of the middle term for the additional crimes (in some cases plus one-third the enhancements) can logically be applied only when all the sentences were imposed under section 1170. Indeterminate sentences under section 1168 will continue to be imposed for some years, considering probation violators. Since the duration of the indeterminate term cannot be known to the court, subdivision (a) sets forth the only feasible mode of sentencing.

On the authority to sentence consecutively to the sentence of another jurisdiction and the effect of such a sentence, see *In re Helman* (1968) 267 Cal.App.2d 307 and cases cited at note 3, *id.* at 310. The mode of sentencing required by subdivision (b) is necessary to avoid the illogical conclusion that the total of the consecutive sentences will depend on whether the other jurisdiction or California is the first to pronounce judgment.

Drafter’s Note

2001—See note following rule 4.100.

Rule 4.452. Determinate sentence consecutive to prior determinate sentence

If a determinate sentence is imposed pursuant to section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, the court in the current case shall pronounce a single aggregate term, as defined in section 1170.1(a), stating the result of combining the previous and current sentences. In those situations:

- (1) The sentences on all determinately sentenced counts in all of the cases on which a sentence was or is being imposed shall be combined as though they were all counts in the current case.

- (2) The judge in the current case shall make a new determination of which count, in the combined cases, represents the principal term, as defined in section 1170.1(a).
- (3) Discretionary decisions of the judges in the previous cases shall not be changed by the judge in the current case. Such decisions include the decision that other than the middle term was justified by circumstances in mitigation or aggravation, making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation justified striking the punishment for an enhancement.

Rule 4.452 renumbered effective January 1, 2001; adopted as rule 452 effective January 1, 1991.

Drafter's Note

2001—See note following rule 4.100.

Rule 4.453. Commitments to nonpenal institutions

When a defendant is convicted of a crime for which sentence could be imposed under section 1170 and the court orders that he or she be committed to the California Youth Authority pursuant to Welfare and Institutions Code section 1731.5, the order of commitment shall specify the term of imprisonment to which the defendant would have been sentenced. The term shall be determined as provided by sections 1170 and 1170.1 and these rules, as though a sentence of imprisonment were to be imposed.

Rule 4.453 renumbered and amended effective January 1, 2001; adopted as rule 453 effective July 1, 1977; previously amended effective July 28, 1977.

Advisory Committee Comment

Youth Authority commitments cannot exceed the maximum possible incarceration in an adult institution for the same crime. *People v. Olivas* (1976) 17 Cal.3d 236. A commitment as an MDSO may not exceed the maximum term of imprisonment for the offenses of which the defendant was convicted. Welfare and Institutions Code section 6316.1 added effective July 1, 1977 (Stats. 1977, ch. 164).

Under the indeterminate sentencing law, the receiving institution knew, as a matter of law from the record of the conviction, the maximum potential period of imprisonment for the crime of which the defendant was convicted.

Under the Uniform Determinate Sentencing Act, the court's discretion as to length of term leaves doubt as to the maximum term when only the record of convictions is present.

Drafter's Note

2001—See note following rule 4.100.

Rule 4.470. Notification of appeal rights in felony cases

After imposing sentence or making an order deemed to be a final judgment in a criminal case upon conviction after trial, or after imposing sentence following a revocation of probation, except where the revocation is after the defendant's admission of violation of probation, the court shall advise the defendant of his or her right to appeal, of the necessary steps and time for taking an appeal, and of the right of an indigent defendant to have counsel appointed by the reviewing court. A reporter's transcript of the proceedings required by this rule shall be forthwith prepared and certified by the reporter and filed with the clerk.

Rule 4.470 renumbered effective January 1, 2001; former rule 470 amended and renumbered effective January 1, 1991; adopted effective January 1, 1972, as rule 250; previously amended effective July 1, 1972, and January 1, 1977.

Drafter's Note

2001—See note following rule 4.100.

Rule 4.472. Determination of presentence custody time credit

At the time of sentencing, the court shall cause to be recorded on the judgment or commitment the total time in custody to be credited upon the sentence under Penal Code sections 2900.5, 2933.1(c), and 2933.2(c). Upon referral of the defendant to the probation officer for an investigation and report under Penal Code section 1203(a) or 1203(f), or upon setting a date for sentencing in the absence of a referral, the court shall direct the sheriff, probation officer, or other appropriate person to report to the court and notify the defendant or defense counsel and prosecuting attorney within a reasonable time prior to the date set for sentencing as to the number of days that defendant has been in custody and for which he or she may be entitled to credit. Any challenges to the report shall be heard at the time of sentencing.

Rule 4.472 renumbered and amended effective January 1, 2001; former rule 472 amended and renumbered effective January 1, 1991; adopted effective January 1, 1977, as rule 252.

Drafter's Note

2001—See note following rule 4.100.

Rule 4.480. Judge's statement under Penal Code section 1203.01

A sentencing judge's statement of his views under Penal Code section 1203.01 respecting a person sentenced to the Department of Corrections is required only in the event that no probation report is filed. Even though it is not required, however, a statement should be submitted by the judge in any case in which he or she believes that the correctional handling and the determination of term and parole should be influenced by information not contained in other court records.

The purpose of a section 1203.01 statement is to provide assistance to the Department of Corrections in its programming and institutional assignment and to the Board of Prison Terms with reference to term fixing and parole release of persons sentenced indeterminately, and parole waiver of persons sentenced determinately. It may amplify any reasons for the sentence which may bear on a possible suggestion by the Director of Corrections or the Board of Prison Terms that the sentence and commitment be recalled and the defendant be resentenced. To be of maximum assistance to these agencies, a judge's statements should contain individualized comments concerning the convicted offender, any special circumstances which led to a prison sentence rather than local incarceration, and any other significant information which might not readily be available in any of the accompanying official records and reports.

If a section 1203.01 statement is prepared, it should be submitted no later than two weeks after sentencing so that it may be included in the official Department of Corrections case summary which is prepared during the time the offender is being processed at the Reception-Guidance Center of the Department of Corrections.

Rule 4.480 renumbered and amended effective January 1, 2001; adopted as Sec. 12 effective January 1, 1973; previously amended effective July 1, 1978.

Drafter's Note

2001—See note following rule 4.100.

DIVISION V. Post-Conviction and Writs

Title Four, Criminal Cases—Division V, Post-Conviction and Writs—retitled effective January 1, 2001

Rule 4.500. [Renumbered 2002]

Rule 4.510. Reverse remand

Rule 4.550. Habeas corpus application and definitions

Rule 4.551 Habeas corpus proceedings

Rule 4.552 Habeas corpus jurisdiction

Rule 4.601. Judicial determination of factual innocence form

Rule 4.500. [Renumbered 2002]

Rule 4.500 amended and renumbered rule 4.551 effective January 1, 2002; adopted as rule 260 effective January 1, 1982; previously renumbered effective January 1, 2001.

Drafter's Notes

1982—Rule 260 regulates habeas corpus procedure in the superior court. It establishes a timetable for handling habeas corpus petitions, places limitations on certain “ex parte” communications, substitutes the term “denial” in place of the outdated “traverse,” and requires a brief statement of the reasons for denial of a petition.

2001—See note following rule 4.100.

Rule 4.510. Reverse remand

- (a) **[Minor prosecuted under Welfare and Institutions Code section 602(b) or 707(d) and convicted of offense listed in Welfare and Institutions Code section 602(b) or 707(d) (§ 1170.17)]** If the prosecuting attorney lawfully initiated the prosecution as a criminal case under Welfare and Institutions Code section 602(b) or 707(d), and the minor is convicted of a criminal offense listed in Welfare and Institutions Code section 602(b) or 707(b), the minor shall be sentenced as an adult.
- (b) **[Minor convicted of an offense not listed in Welfare and Institutions Code section 602(b) or 707(d) (§ 1170.17)]**
 - (1) If the prosecuting attorney lawfully initiated the prosecution as a criminal case and the minor is convicted of an offense not listed in Welfare and Institutions Code section 602(b) or 707(d), but one that would have raised the presumption of unfitness under juvenile court law, the minor may move the court to conduct a postconviction fitness hearing.
 - (A) On the motion by the minor, the court shall order the probation department to prepare a report as required in rule 1481.

- (B) The court may conduct a fitness hearing or remand the matter to the juvenile court for a determination of fitness.
 - (C) The minor may receive a disposition hearing under the juvenile court law only if he or she is found to be fit under rule 1483. However, if the court and parties agree, the minor may be sentenced in adult court.
 - (D) If the minor is found unfit, the minor shall be sentenced as an adult, unless all parties, including the court, agree that the disposition be conducted under juvenile court law.
- (2) If the minor is convicted of an offense not listed in Welfare and Institutions Code section 602(b) or 707(d), but one for which the minor would have been presumed fit under the juvenile court law, the minor shall have a disposition hearing under juvenile court law, and consistent with the provisions of section 1170.19, either in the trial court or on remand to the juvenile court.
- (A) If the prosecuting attorney objects to the treatment of the minor as within the juvenile court law and moves for a fitness hearing to be conducted, the court shall order the probation department to prepare a report as required by rule 1481.
 - (B) The court may conduct a fitness hearing or remand the matter to the juvenile court for a determination of fitness.
 - (C) If found to be fit under rule 1482, the minor shall be subject to a disposition hearing under juvenile court law and section 1170.19.
 - (D) If the minor is found unfit, the minor shall be sentenced as an adult, unless all parties, including the court, agree that the disposition be conducted under juvenile court law.
- (3) If the minor is convicted of an offense that would not have permitted a fitness determination, the court shall remand the matter to juvenile court for disposition, unless the minor requests sentencing in adult court and all parties, including the court, agree.
- (4) Fitness hearings held under this rule shall be conducted as provided in chapter 8, part II.

Rule 4.510 adopted effective January 1, 2001.

Drafter's Notes

2001—See note following rule 1430.

Rule 4.550. Habeas corpus application and definitions

- (a) **[Application]** This rule applies to habeas corpus proceedings in the superior court under Penal Code section 1473 et seq. or any other provision of law authorizing relief from unlawful confinement or unlawful conditions of confinement.
- (b) **[Definitions]** In this rule, the following definitions apply:
 - (1) A “petition for writ of habeas corpus” is the petitioner’s initial filing that commences a proceeding.
 - (2) An “order to show cause” is an order directing the respondent to file a return. The order to show cause is issued if the petitioner has made a prima facie showing that he or she is entitled to relief; it does not grant the relief requested. An order to show cause may also be referred to as “granting the writ.”
 - (3) The “return” is the respondent’s statement of reasons that the court should not grant the relief requested by the petitioner.
 - (4) The “denial” is the petitioner’s pleading in response to the return. The denial may be also referred to as the “traverse.”
 - (5) An “evidentiary hearing” is a hearing held by the trial court to resolve contested factual issues.
 - (6) An “order on writ of habeas corpus” is the court’s order granting or denying the relief sought by the petitioner.

Rule 4.550 adopted effective January 1, 2002.

Drafter's Notes:

2002—See note following rule 201.

Rule 4.551 Habeas corpus proceedings

- (a) **[Petition; form and court ruling]**

- (1) Except as provided in subdivision (2), the petition must be on the form approved by the Judicial Council, *Petition for Writ of Habeas Corpus* (form MC-275), and must be served as required in Penal Code section 1475.
- (2) For good cause, a court may also accept for filing a petition that does not comply with subdivision (a)(1). A petition submitted by an attorney need not be on the Judicial Council form. However, a petition that is not on the Judicial Council form must comply with Penal Code section 1474 and must contain the pertinent information specified in form MC-275, including the information required regarding other petitions, motions, or applications filed in any court with respect to the conviction, commitment, or issue.
- (3) Upon filing, the clerk of the court must immediately deliver the petition to the presiding judge or his or her designee. The court must rule on a petition for writ of habeas corpus within 30 days after the petition is filed. If the court fails to rule on the petition for writ of habeas corpus within 30 days of its filing, an order to show cause will be deemed to have issued under subdivision (c).
- (4) For the purposes of subdivision (a)(3), the court rules on the petition by:
 - (A) Issuing an order to show cause under subdivision (c);
 - (B) Denying the petition for writ of habeas corpus; or
 - (C) Requesting an informal response to the petition for writ of habeas corpus under subdivision (b).
- (5) The court must issue an order to show cause or deny the petition within 45 days after receipt of an informal response requested under subdivision (b) of this rule.

(Subd (a) amended effective January 1, 2002; adopted effective January 1, 1982.)

(b) [Informal response]

- (1) Before passing on the petition, the court may request an informal response from:

- (A) The respondent or real party in interest; or
 - (B) The custodian of any record pertaining to the petitioner's case, directing the custodian to produce the record or a certified copy to be filed with the clerk of the court.
- (2) A copy of the request must be sent to the petitioner. The informal response, if any, must be served upon the petitioner by the party of whom the request is made. The informal response must be in writing and must be served and filed within 15 days. If any informal response is filed, the court must notify the petitioner that he or she may reply to the informal response within 15 days from the date of service of the response upon the petitioner. If the informal response consists of records or copies of records, a copy of every record and document furnished to the court must be furnished to the petitioner.
 - (3) After receiving an informal response, the court may not deny the petition until the petitioner has filed a timely reply to the informal response or the 15-day period provided for a reply under subdivision (b)(2) has expired.

(Subd (b) adopted effective January 1, 2002.)

(c) [Order to show cause]

- (1) The court must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled to relief. In doing so, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.
- (2) Upon issuing an order to show cause, the court must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel.
- (3) An order to show cause is a determination that the petitioner has made a showing that he or she may be entitled to relief. It does not grant the relief sought in the petition.

(Subd (c) adopted effective January 1, 2002.)

- (d) **[Return]** If an order to show cause is issued as provided in subdivision (c), or if the court fails to rule on the petition in a timely manner as required in subdivision (a)(3), the respondent may, within 30 days thereafter, file a return. Any material allegation of the petition not controverted by the return is deemed admitted for purposes of the proceeding. The return must comply with Penal Code section 1480 and must be served on the petitioner.

(Subd (d) repealed and adopted effective January 1, 2002.)

- (e) **[Denial]** Within 30 days after service and filing of a return, the petitioner may file a denial. Any material allegation of the return not denied is deemed admitted for purposes of the proceeding. Any denial must comply with Penal Code section 1484 and must be served on the respondent.

(Subd (e) amended and relettered effective January 1, 2002; adopted as subd (b) effective January 1, 1982.)

- (f) **[Evidentiary hearing; when required]** Within 30 days after the filing of any denial or, if none is filed, after the expiration of the time for filing a denial, the court must either grant or deny the relief sought by the petition or order an evidentiary hearing. An evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact. The petitioner must be produced at the evidentiary hearing unless the court, for good cause, directs otherwise.

(Subd (f) amended and relettered effective January 1, 2002; adopted as subd (c) effective January 1, 1982.)

- (g) **[Reasons for denial of petition]** Any order denying a petition for writ of habeas corpus must contain a brief statement of the reasons for the denial. An order only declaring the petition to be "denied" is insufficient.

(Subd (g) amended and relettered effective January 1, 2002; adopted as subd (e) effective January 1, 1982.)

- (h) **[Extending or shortening time]** On motion of any party or on the court's own motion, for good cause stated in the order, the court may

shorten or extend the time for doing any act under this rule. A copy of the order must be mailed to each party.

(Subd (h) amended and relettered effective January 1, 2002; adopted as subd (f) effective January 1, 1982.)

Rule 4.551 amended and renumbered effective January 1, 2002; adopted as rule 260 effective January 1, 1982; previously renumbered as rule 4.500 effective January 1, 2001.

Drafter's Notes

1982—Rule 260 regulates habeas corpus procedure in the superior court. It establishes a timetable for handling habeas corpus petitions, places limitations on certain “ex parte” communications, substitutes the term “denial” in place of the outdated “traverse,” and requires a brief statement of the reasons for denial of a petition.

2001—See note following rule 4.100.

2002—See note following rule 201.

Rule 4.552 Habeas corpus jurisdiction

(a) **[Proper court to hear petition]** Except as set forth in subdivision (b)(2), the petition must be heard and resolved in the court in which it is filed.

(b) **[Transfer of petition]**

(1) The superior court in which the petition is filed must determine, based on the allegations of the petition, whether the matter should be heard by it or in the superior court of another county.

(2) If the superior court in which the petition is filed determines that the matter may be more properly heard by the superior court of another county, it may nonetheless retain jurisdiction in the matter or, without first determining whether a prima facie case for relief exists, order the matter transferred to the other county. Transfer may be ordered in the following circumstances:

(A) If the petition challenges the terms of a judgment, the matter may be transferred to the county in which judgment was rendered.

- (B) If the petition challenges the conditions of an inmate's confinement, it may be transferred to the county in which the petitioner is confined. A change in the institution of confinement that effects a change in the conditions of confinement may constitute good cause to deny the petition.
- (3) The transferring court must specify in the order of transfer the reason for the transfer.
- (4) If the receiving court determines that the reason for transfer is inapplicable, the receiving court must, within 30 days of receipt of the case, order the case returned to the transferring court. The transferring court must retain and resolve the matter as provided by these rules.
- (c) **[Single judge must decide petition]** A petition for writ of habeas corpus filed in the superior court must be decided by a single judge; it must not be considered by the appellate division of the superior court.

Rule 4.552 adopted effective January 1, 2002.

Drafter's Notes:

2002—See note following rule 201.

Rule 4.601. Judicial determination of factual innocence form

- (a) **[Form to be confidential]** Any form CR-150, *Certificate of Identity: Judicial Determination of Factual Innocence*, that is filed with the court is confidential. The clerk's office must maintain these forms in a manner that will protect and preserve their confidentiality.
- (b) **[Access to the form]** Notwithstanding subdivision (a), the court, the identity theft victim, the prosecution, and law enforcement agencies may have access to the CR-150. The court may allow access to any other person on a showing of good cause.

Rule 4.601 adopted effective January 1, 2002.

Drafter's Notes:

2002—This new rule and the form adopted with it (CR-150, *Certificate of Identity Theft: Judicial Determination of Factual Innocence*) implement Penal Code section 530.6, which requires the Judicial Council of California to adopt a form for "identity theft" victims. The form memorializes a court finding that a victim of identity theft was factually innocent. Additionally, the identity theft victim can use the form as proof of the

court's finding if he or she is contacted by the police. The original form is filed with the court and the identity theft victim is to be given a certified copy. The filed original is confidential under rule 4.601.